Due service and receipt of a copy of the within is hereby admitted

this _____ *day of April, 1938.*

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Attorneys for Petitioner.

FILE COPY

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1938

No. 15

WAIALUA AGRICULTURAL COMPANY, LIMITED,
Petitioner,

vs.

ELIZA R. P. CHRISTIAN, an incompetent person, by HERMAN V. VON HOLT, her guardian, et al.

No. 17

ELIZA R. P. CHRISTIAN, an incompetent person, by HERMAN V. VON HOLT, her guardian,
Petitioner,

vs.

WAIALUA AGRICULTURAL COMPANY, LIMITED.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

OPENING BRIEF OF ELIZA R. P. CHRISTIAN, AN INCOMPETENT PERSON.

M. C. SLOSS,
111 Sutter Street, San Francisco, California,
CHARLES M. HITE,
Dillingham Building, Honolulu, T. H.,
Attorneys for Eliza R. P. Christian, An Incompetent Person.

E. D. TURNER, JR.,
CHARLES E. FINNEY,
SLOSS, TURNER & FINNEY,
111 Sutter Street, San Francisco, California,
Of Counsel.

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Decision on second appeal to the Supreme Court of Hawaii—33 Haw. 34;

Decision on first appeal to the United States Circuit Court of Appeals—52 Fed. (2d) 847;

Decision on second appeal to the United States Circuit Court of Appeals—93 Fed. (2d) 603;

Supplemental decision denying rehearing—C. C. A. 94 Fed. (2d) 806.

JURISDICTION.

The jurisdiction of this Court is invoked under Judicial Code Section 240, U. S. C., Title 28, Sec. 347. The date of the decree of the United States Circuit Court of Appeals which is being reviewed is December 9, 1937 and the date of the denial of the petition for rehearing in that Court is February 1, 1938. Certiorari was granted herein by this Court on May 2, 1938 upon petition filed March 30, 1938 and cross-petition filed March 31, 1938.

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STATEMENT OF THE CASE.

The case, which is one in equity, comes to this Court on certiorari (granted on petition and cross petition) to the Circuit Court of Appeals for the Ninth Circuit, to which

appeals by both parties had been taken from a decree of the Supreme Court of Hawaii, affirming in part and reversing in part a decree of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers. It involves an undivided one-third interest in a tract of land situate on the Island of Oahu, Territory of Hawaii, and having an area of some 14,000 acres. The tract will hereinafter be referred to as the "Holt land".

Robert W. Holt, an Englishman, came to Hawaii in the early part of the nineteenth century (R. 842) and there married a native Hawaiian woman. He accumulated a substantial estate, which included the Holt land, and died testate in 1862 (R. 113). His wife had predeceased him. He left surviving three sons, and a daughter by an earlier marriage, Elizabeth M. Aldrich. Omitting further reference to Mrs. Aldrich, who has no interest in the property here involved, the family relationships of R. W. Holt and his descendants are illustrated by the following diagram (R. 843):

R. W. HOLT
Died 1862

OWEN J. HOLT	JAMES R. HOLT		JOHN DOMINIS HOLT
Born Dec. 10, 1842 Died June 10, 1891	Born Oct. 17, 1838 Died Apr. 18, 1916		Born Dec. 17, 1839 Died Apr. 10, 1922
	ROBERT HOLT	JAMES L. HOLT	ELIZA CHRISTIAN
Robert W. Holt Edward S. Holt Chris Holt George H. Holt James R. Holt, Jr. John D. Holt, Jr. Owen J. Holt, Jr. Elizabeth H. Richardson Annie Holt Kentwell	Born ——— Died 1918	Born Nov., 1873	Born Dec. 30, 1885

Under the terms of R. W. Holt's will, each of the three sons took a life estate in one-third of the Holt land, the remainder as to each one-third being in the heirs of the respective sons (R. 843). Eliza R. P. Christian (who by her guardian was the petitioner or complainant in the Circuit Court of Hawaii, and who will hereinafter be referred to as the "incompetent") is the only heir of one of the sons, John D. Holt, and upon his death in 1922, except as her rights may be affected by the instruments assailed in this suit, she became the owner in fee of an undivided one-third interest in the Holt land.

The incompetent was born December 30, 1885, at Makaha, Waianae, on the Island of Oahu, about thirty miles from the City of Honolulu (R. 120). Her mother, a native Hawaiian woman (R. 844), died when the incompetent was about seven years of age, after which her father brought her to Honolulu to live (R. 844). Her father was a shiftless and profligate man (R. 121), and apparently made no permanent home for her, but drifted from place to place, living with different relatives in Honolulu (R. 120). She was placed in various convents during her early life, without, as the trial Court said (R. 121), "leaving a record of accomplishment beyond the most elementary character". She was taken out of school in 1902, when she was approximately sixteen years of age, because she gave birth to an illegitimate child (R. 845), and since that time has, as the trial Court said (R. 121), been "the family drudge and charge of Annie Holt Kentwell and her husband Lawrence Kentwell".[1] In 1906, the Kentwells took the incompetent and her father, who was

1. Annie Holt Kentwell was one of the nine children of Owen J. Holt, and a first cousin of the incompetent.

then sixty-six years of age from Honolulu and, after stopping at several places in the United States, lived in New Jersey until 1909. While in New Jersey, the incompetent gave birth, on a railroad platform, to a second illegitimate child (R. 846). Shortly thereafter they all moved to Oxford, England (R. 121). A third illegitimate child was born to the incompetent in London in 1915 and is now living in England (R. 846-7). Lawrence Kentwell abandoned his family in 1919 (R. 847). John D. Holt died in 1922 (R. 847). The incompetent has continued to live in Oxford, England, with Annie Kentwell.

In 1905, during John D. Holt's lifetime, and when the incompetent was nineteen years of age, a lease of the Holt tract was made by those then having a present vested interest, to Waialua Agricultural Company, Ltd. (the corporation against which the instant suit is brought and which will hereafter be referred to as "Waialua") as lessee, for a term of twenty-five years (R. 874). The incompetent, with respect to her contingent remainder in one-third of the property, assented to the lease, as did others. In 1906, during John D. Holt's lifetime, the incompetent executed an agreement with her cousin, Annie Holt Kentwell, assigning the rents to accrue to the incompetent under the 1905 lease[2] to Annie Kentwell, in consideration of the latter's undertaking to support the incompetent

2. One of the questions presented to and decided by the United States Circuit Court of Appeals was the proper construction of this instrument of 1906, and that Court determined it to be an assignment of rents under the 1905 lease. Waialua has not attacked that construction in its petition for certiorari, and accordingly it is not open to dispute in this hearing. (*General Talking Pictures Corp. v. Western Electric Co.*, (1938), 82 L. Ed. (Ad. Op.) 843.) Furthermore, no broader construction is possible, for if the instrument were construed as attempting to transfer all rents during the incompetent's life it would be invalid for want of the written consent of the incompetent's husband. (Revised Laws of Hawaii, 1925 §2993; opn. of Wilbur, J. in the Circuit Court of Appeals (R. 1621-3).)

for her lifetime (R. 895). In 1910, the incompetent executed a deed, in which Annie Kentwell joined and which deed transferred to a nominee of Waialua the interest of the incompetent and of Annie Kentwell in the Holt tract. It is by virtue of this conveyance that Waialua claims to have succeeded to Annie Kentwell's rights under the instrument of 1906, which, as stated above, was held by the Circuit Court of Appeals to be no more than an assignment of rents under the lease of 1905. In 1922, the incompetent's father, John D. Holt, died, leaving surviving him as his only heir the incompetent, who thereupon became, unless her rights are affected by the lease, the agreement and deed hereinabove described, the owner in fee of an undivided one-third interest in the Holt tract. In 1926 a guardian was appointed for the incompetent in England (R. 847). In 1927, a guardian was appointed in Hawaii, and in 1928 this suit was commenced in the Circuit Court of Hawaii, at Chambers. The petition, as amended (R. 339) sought:

(a) To set aside as to the incompetent

(1) the lease of 1905;

(2) the instrument of 1906;

(3) the deed of 1910; and

(b) To recover the reasonable rental value of the land covered by the deed since the vesting of the petitioner's title in 1922.

All these documents, as outlined, relate to the incompetent's undivided one-third interest in the Holt tract. The ground upon which the suit was founded was that at the date of the execution of each of the instruments, Eliza Christian was mentally incompetent. She offered to make

such restitution as the Court might deem just (R. 357-8 and 365-6). The beneficial ownership of the lease has been in Waialua since its execution in 1905, the beneficial ownership of the assignment of 1906 and the deed have been in Waialua since the date of the deed, May 2, 1910, although legal title has been transferred to different nominees in the interim (R. 1061). In 1921, after the provision of the Hawaiian Organic Act preventing a corporation from holding more than 1,000 acres of land (Apr. 30, 1900, C. 339 §55, 31 Stat. 150 (U.S.C. Tit. 48 §562), was repealed (amendment of July 9, 1921, 42 Stat. 116), title was taken directly by Waialua (R. 1589).

The trial Court, in 1929, entered a decree in favor of the incompetent (R. 186) restoring to her an undivided one-third interest in the Holt land and awarding her the reasonable rental value of the lands from April 10, 1922, when her father died and her title vested, to the date of the decree, less the purchase price of $30,000 paid by Waialua, with interest thereon. Waialua, as hereafter pointed out (infra, p. 32) was the owner of other undivided interests in the Holt lands, and the cancellation of the deed from the incompetent resulted in Waialua and the incompetent becoming tenants in common of the land. Accordingly, the decree also provided that it was without prejudice to an accounting, in the event of partition between the incompetent and Waialua, for permanent improvements which may have been made by Waialua upon the lands covered by the decree (R. 189-190).

Waialua then took an appeal to the Supreme Court of Hawaii, which Court, on a full review of the evidence, affirmed the finding of incompetency, declaring that "on May 2, 1910 Eliza Christian was and is and at all times

has been mentally incompetent to execute a deed or to understand its purpose or effect or to engage in any business transaction of consequence * * * That at the date of the deed she was a congenital imbecile" (R. 272, 273). That Court further held, as had the trial Court, that the deed of May 2, 1910, so far as it affects the incompetent's interest in the land described, should be cancelled (R. 323), and that status quo could be restored (R. 297-300). It considered that Waialua's rights with respect to improvements could be fully protected on partition which might thereafter be brought (R. 297-300). The Supreme Court further determined, however, that the lease of 1905 and the instrument of 1906 had not been in issue on the trial in the Circuit Court, ordered that the incompetent have leave to amend her petition and remanded the cause for such additional evidence as the trial Court might deem proper, touching the circumstances of the execution of the 1905 lease and the 1906 instrument by the incompetent, *other than her incompetency* (R. 326).

Waialua then took an appeal to the United States Circuit Court of Appeals, which was dismissed as premature (52 Fed. (2d) 847). In accordance with the remand order the trial Court then proceeded to take additional evidence and entered a second decree in 1932 in favor of the incompetent (R. 533). The trial Court found that Eliza Christian was incompetent at the time each of the documents was executed; that she was a "congenital imbecile" (R. 476), and gave judgment for the incompetent, cancelling the lease of 1905, the assignment of 1906, and the deed of 1910, and awarded the petitioner a money judgment as of September 6, 1932, in the net sum of $606,785.75, for the use and occupation of her property by Waialua to that date.

after deducting the consideration paid for the deed with interest thereon at 6% per annum. The trial Court found that status quo could be restored (R. 526) and by its decree (R. 533) gave to Waialua, until partition or other severance be sought and decreed, the right to continue in the exclusive use and occupation of the permanent improvements which it had placed on the land, and decreed that upon partition between the incompetent and Waialua, Waialua be insured the right of an election to have allocated to it all of the sites of such improvements, the adjustment with the incompetent to be solely on an equivalent area basis without reference to the value of such improvements.

Waialua took a second appeal to the Supreme Court of Hawaii, which in 1934 rendered an opinion (R. 550, 33 Haw. 34) affirming the trial Court's judgment cancelling the deed of 1910, but—one of the three Justices dissenting (R. 589)—reversing it as to the cancellation of the lease of 1905, the cancellation of the assignment of 1906, and the money judgment for rents, and entered a decree accordingly (R. 631). The Supreme Court found that status quo could be restored (R. 579) and, by its decree, in addition to providing for the repayment by the incompetent of the purchase price of $30,000, with interest, required her to convey to Waialua all her interest in those parts of the Holt land occupied by permanent improvements placed thereon by Waialua. The reversal of the money judgment was based upon the determination by the Supreme Court of Hawaii that the lease of 1905 and the instrument of 1906 were valid despite the incompetency of Eliza Christian, and that the 1906 instrument was an assignment or conveyance of the rents, issues and profits of the property

for the entire lifetime of the incompetent.[3] The finding of the trial Court that the petitioner was incompetent during the whole of her life, a "congenital imbecile", was not disturbed by the Supreme Court of Hawaii; it was confirmed (R. 552). Both parties thereupon appealed to the United States Circuit Court of Appeals for the Ninth Circuit (R. 778, 806). That Court, on December 9, 1937, rendered its decision upon the two appeals (R. 1586, 93 Fed. (2d) 603; supplemental opinion denying a rehearing R. 1633, 94 Fed. (2d) 806), in which it

(a) confirmed the finding of congenital imbecility in 1910;

(b) affirmed the cancellation of the deed of 1910 on the ground of incompetency, coupled with the ability of the petitioner to restore Waialua to status quo;

(c) directed a remand to the trial Court to take such evidence as it deemed appropriate to enable it to make a finding on the issue of competency in 1905 and 1906, and also to fix the amount of the allowance for improvements as hereinafter discussed;

(d) ordered the entry of a judgment cancelling both the lease of 1905 and the instrument of 1906 if the trial Court should find upon said remand that the petitioner was incompetent at both of those dates;

(e) directed that the petitioner recover the reasonable rental value of her interest from 1922, when her title vested, in the event the lease of 1905 and the instrument of 1906 were cancelled, or from 1930 if neither of them was cancelled;

3. As previously stated (Fn. 2 p. 4), if the instrument of 1906 is valid at all, it is only an assignment of rents to accrue under the 1905 lease, which expired in 1930.

(f) directed, as a condition to the cancellation of the deed, the return of the consideration paid by Waialua therefor, with interest, and also (in the event of the cancellation of the lease, which contains a provision that upon its termination in 1930 the improvements placed on the land should become the property of the landlord) that an allowance be made to Waialua in an amount by which the land has been enhanced in value by the addition of improvements, not, however, to exceed their cost. A decree was entered accordingly (R. 1628).

Waialua filed a petition for certiorari before this Court, and the incompetent thereafter filed a cross-petition. Writs were granted upon both petitions.

The case has now been before the trial Court twice, the Supreme Court of Hawaii twice, and the United States Circuit Court of Appeals twice, and each Court has (a) concluded that Eliza Christian is a "congenital imbecile", (b) cancelled the deed of 1910, and (c) determined that an appropriate restoration could be made to Waialua to compensate it for the purchase price paid and the improvements it placed upon the land. In addition, both the trial Court and the United States Circuit Court of Appeals have decided that the lease of 1905 and the instrument of 1906 should be cancelled, the Circuit Court of Appeals, as outlined above, conditioning the cancellation of the 1905 lease and the 1906 instrument upon another finding of incompetency, by the trial Court, at the time of the execution of such instruments. We shall hereafter consider the necessity of this additional finding.

The findings of congenital imbecility, and that restoration can be effected are, under the well settled rule of this

Court, that it will accept findings of the trial Court concurred in by an intermediate appellate Court, now not open to question. Similarly, the construction of the 1906 instrument as being an assignment of rents under the 1905 lease is settled because Waialua's petition for certiorari in no way attacks that determination. We start with these premises.

SPECIFICATION OF ERRORS.

The errors which we intend to urge are those set forth in the cross-petition for certiorari herein, namely:

1. The United States Circuit Court of Appeals erred in requiring as a condition to cancellation that the incompetent restore the consideration and make an allowance for improvements, since

(a) the burden was upon Waialua to prove that it was an innocent purchaser and it failed so to do. Unless it was an innocent purchaser restoration is not required as a condition to cancellation;

(b) it affirmatively appears that Waialua, through its agent James L. Holt, had knowledge of the incompetency, and accordingly restoration is not a requisite to cancellation;

(c) the rule of decision in the Federal Courts, which is the rule of decision in cases arising in the Territory of Hawaii, is that a contract of an incompetent is a nullity without regard to the good faith of the other contracting party, and accordingly restoration is not a requisite to relief therefrom;

(d) the finding is that the incompetent never received the consideration paid by Waialua for the

deed. Restoration of the consideration is not a condition to cancellation when the incompetent has not received the same.

2. The United States Circuit Court of Appeals erred in remanding the suit for a determination of the issue of competency in 1905 and 1906, when the lease and assignment, respectively, were executed, since there is already a finding by the trial Court, amply supported by the evidence and concurred in by the Supreme Court of Hawaii and the United States Circuit Court of Appeals, that Eliza Christian was incompetent at all times in her life—a congenital imbecile,—which necessarily includes a finding that she was incompetent in 1905 and 1906, as well as 1910.

SUMMARY OF THE ARGUMENT.

(a) The decision amply sustained.

The decision of the Circuit Court of Appeals that, even assuming the good faith of the other contracting party and the adequacy of the consideration, an incompetent may set aside her contracts when restoration to status quo can be effected is supported by the rule obtaining throughout the American decisions. The finding of the trial Court, concurred in by the Supreme Court of Hawaii and the United States Circuit Court of Appeals, is that Eliza Christian is a congenital imbecile. Likewise, all three courts concur that status quo, within the meaning of the rule, can be effected in this case. Beyond this, the finding of the trial Court here is that the consideration paid was inadequate.

Quite apart from the fact of incompetency, the transaction involves the sale of an expectancy, and in such instances, to sustain the transaction Waialua must show adequacy of consideration and fairness in dealing. Here the findings are against Waialua on both points and the purchase cannot stand.

(b) **Restoration should not be a condition to cancellation.**

An incompetent, as a condition to setting aside a deed, need not make an allowance to the purchaser for improvements placed on the land or restore the consideration unless the purchaser acted in good faith i.e., without notice of the incompetency. The burden of proving good faith is on the one claiming it, and here there is no evidence in the record to prove that Waialua was a bona fide purchaser, and the finding should have been against it on the issue. On the contrary, the findings are that Waialua purchased the property through an agent, James L. Holt, and that at all times he had knowledge of the incompetency. This being so, it follows as a matter of law that Waialua took with knowledge of the incompetency since the knowledge of the agent is imputed to the principal.

An incompetent, as a condition to cancellation of an instrument, need not restore the consideration with which the other contracting party has parted if the incompetent never received it, and the finding here is that the incompetent never received the consideration for the deed of 1910.

Even though it be assumed that Waialua acted in good faith the rule of decision here is the rule obtaining in the Federal Courts which is that the contract of an incom-

petent is void and a nullity. Accordingly restoration is not a condition to cancellation.

(c) There is no necessity for a remand.

There is no necessity for a remand on the issue of competency in 1905 and 1906. The evidence on the question of competency covered the whole of the petitioner's life (R. 116 to 134, and R. 202 to 273). The Supreme Court, in its opinion, considered the evidence by periods of the petitioner's lifetime, and one of these periods—from 1902 to 1906—covers the very time during which the lease and the assignment were executed (R. 220). There is already a finding by the trial Court that the petitioner was a "congenital imbecile" (R. 491), and this finding has been concurred in by the Supreme Court of Hawaii (R. 552), and again by the United States Circuit Court of Appeals (R. 1605). The Circuit Court of Appeals directs the deed of 1910 to be cancelled, as did both the trial Court and the Supreme Court of Hawaii, upon the ground that the petitioner was at that time a "congenital imbecile". It is beyond question that one who is a congenital imbecile in 1910 must also have been incompetent in 1905 and 1906. There is no necessity for a further finding on the competency of the petitioner in 1905 and 1906.

The lease of 1905, the instrument of 1906, and the deed of 1910, should all be cancelled, and the incompetent awarded the reasonable rental value of the property, since the vesting of her title in 1922. She should not be required to compensate Waialua for improvements which it placed upon the property or to restore the consideration paid for the deed.

THE ARGUMENT.

(A) THE DECISION OF THE CIRCUIT COURT OF APPEALS IS ABUNDANTLY SUPPORTED BY THE AUTHORITIES.

Before presenting the argument in support of the points made in the cross-petition which would, if sustained, enlarge the incompetent's rights, we will review the general propositions of law which amply sustain the recovery granted by the Circuit Court of Appeals.

(1) The general rule that incompetents are entitled to set aside their contracts upon making restoration.

The decision of the Circuit Court of Appeals follows the rule obtaining throughout the American courts, that even assuming the good faith of the other contracting party and the adequacy of the consideration, an incompetent may set aside a contract upon restoring such party to status quo.[4] In fact, many of the cases, particularly those

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4. *Wooley v. Gaines* (1901), 114 Ga. 122, 39 S.E. 892; *Nutter v. Des Moines Life Ins. Co.* (1912), 156 Iowa 539, 136 N.W. 891; *Merry v. Bergfeld* (1914), 264 Ill. 84, 105 N.E. 758; *McKenzie v. Donnell* (1899), 151 Mo. 431, 52 S.W. 214; *Fulgider v. Ingels* (1882), 87 Ind. 414; *Hays v. Spangenberg* (Texas Civ. App. 1936), 94 S.W. (2d) 899; *Loomis & Hayden v. Spencer & Rolph* (1830), 2 Paige (N. Y.) 153; *Edwards v. Miller* (1924), 102 Okla. 189, 228 Pac. 1105; *Cash. v. Bank of Lowes* (1922), 196 Ky. 570, 245 S.W. 137; *Woolbert v. Lee Lumber Co.* (1928), 151 Miss. 56, 117 So. 354; *Hancock v. Haley* (Texas Civ. App. 1914), 171 S.W. 1053; *Ipock v. Atlantic & N.C.R. Co.* (1912), 158 N.C. 445, 74 S.E. 352; *Wirebach's Ex'r. v. Eastern First National Bank* (1891), 97 Pa. St. 543, 39 Amer. Reps. 821; *Crawford v. Scovell* (1880), 94 Pa. 48, 39 Am. Rep. 766; *Eaton v. Eaton* (1874), 37 N.J.L. 108, 18 Am. Rep. 716; *Sparrowhawk v. Erwin* (1926), 30 Ariz. 238, 246 Pac. 541; *Walsh v. Feustel* (1919), 93 Conn. 336, 105 Atl. 696; *Brown v. Cory* (1900), 9 Kan. App. 702, 59 Pac. 1097; *Flach v. Gottschalk Co.* (1898), 88 Md. 368, 41 Atl. 908; *Schaps v. Lehner* (1893), 54 Minn. 208, 55 N.W. 911; *Anderson v. Nelson* (1929), 248 Mich. 160, 226 N.W. 830; *Bell v. Smith* (1929), 155 Miss. 227, 124 So. 331; *Miller v. Barber* (1905), 73 N.J.L. 38, 62 Atl. 276; *Hosker v. Beard* (1896), 54 Ohio St. 398, 43 N.E. 1040; *Pritchett v. Thomas Plater & Co.* (1921), 144 Tenn. 406, 232 S.W. 961; *National Metal Edge Box Co. v. Vanderveer* (1912), 85 Vt. 488, 82 Atl. 837; *Morris v. Hall* (1921), 89 W.Va. 460, 109 S.E. 493; *Dexter v. Hall* (1873), 82 U.S. 9, 21 L. Ed. 73; *Kendall v. Ewert* (1922), 259 U.S. 139, 66 L. Ed. 862; *Plaster v. Rigney* (C.C.A. 8, 1899), 97 Fed. 12; *Edwards v. Davenport* (1883), 20 Fed. 756; *Anglo-California Bank v. Ames* (1886), 27 Fed. 727; *German Savings & Loan Society v. DeLashmutt* (1895), 67 Fed. 399; *Clark Car Co. of New Jersey v. Clark et al.* (D.C. Pa., 1925), 11 Fed. (2d) 814; *Sothern v. United States* (D.C. Ark., 1926), 12 Fed. (2d) 936; *Farmers Bank & Trust Co. v. Public Service Co. of Ind.* (1936), 13 Fed. Supp. 548.

decided in the Federal Courts,[5] do not require any restoration to be effected, even under such circumstances (46 A.L.R. 416, at 433; 95 A.L.R. 1442, at 1447).

Eliza Christian is a congenital imbecile—Status quo can be restored.

As heretofore outlined (supra, pp. 7-10), the trial Court found, and the Supreme Court of Hawaii and the United States Circuit Court of Appeals each confirmed the finding, that Eliza Christian is a congenital imbecile. Similarly, all three courts have concluded that status quo, within the meaning of the rule, can be restored (R. trial Court 526; Supreme Court 297-300 and 579; Circuit Court of Appeals 1605). The term "status quo" means substantially the position occupied before the transaction. It is an equitable concept and is not subject to any ironclad definition. The rule requires only that the one enti-

5. *Dexter v. Hall, Kendall v. Ewert, Plaster v. Rigney, Edwards v. Davenport, Anglo-California Bank v. Ames, German Savings & Loan Society v. DeLashmutt, Clark Car Co. of New Jersey v. Clark, et al., Sothern v. United States, Farmers Bank & Trust Co. v. Public Service Co. of Indiana*—supra note 4.

NOTE: In view of the decision in *Tompkins v. Erie R. R.* (1938), 82 L. Ed. (ad. op.) 787, and of the fact that *Swift v. Tyson* (1842), 16 Pet. 1, 10 L. Ed. 865, is cited in the opinion of the Circuit Court of Appeals in the instant case, we wish to point out that the doctrine of *Swift v. Tyson* (overruled by the *Tompkins* case) has no bearing upon the questions to be decided here. *Swift v. Tyson* turned on the rule of decision to be applied in cases cognizable in the courts of a state but instituted in, or transferred to, a federal court because the parties are citizens of different states (Cons. U. S. Art. III, Sec. 2; Jud. Act 1789, Sec. 34). The question was how far a federal court, in such cases, was bound by the rules declared by the courts of the state in which the controversy arose even though the federal court itself might entertain a different view. In the present case no such question is involved. The controversy did not arise in any state, but in the Territory of Hawaii. The law to be applied is the law of Hawaii. The rule of decision in Hawaii is the rule prevailing in the Circuit Court of Appeals for the Ninth Circuit and the United States Supreme Court, because those courts are the highest courts of appeal for cases arising in the territorial courts. (U. S. Jud. Code, Sec. 128, Subd. Fourth, U.S.C. Tit. 28 §225.) The territorial courts are a part of the federal judiciary system. The rule of decision of the courts, territorial and federal, must be the rules laid down and applied by the courts to which appeals lie—here the Circuit Court of Appeals for the Ninth Circuit and the Supreme Court of the United States. (*Successors of Fantanzzie v. Municipal Assembly* (C.C.A. 1, 1924), 295 Fed. 803; *Kapiolani v. Atcherley* (1913), 21 Haw. 441; *Territory v. Ho Me* (1922), 26 Haw. 331; *Colburn v. U. S. F. & G. Co.* (1920), 25 Haw. 536; *Hill v. Carter* (C.C.A. 9, 1931), 47 Fed. (2d) 869 (cert. den. 284 U.S. 625).)

tled to cancellation shall make such restoration as is consistent with the practical considerations of the case.[6] Mathematical exactness is not necessary.[7] It has been held

(1) That the fact that certain horses have died, and wagons and harness have worn out, and accordingly cannot be restored, does not preclude the cancellation of a settlement in which they were given as consideration. *Burnham Admnstr. v. Mitchell* (1874), 34 Wis. 117, wherein the Court said:

> "But we do not think there is any inflexible rule of law which requires, in a case like the present, that restitution should be made of everything paid and delivered by the defendant in pursuance of the settlement, as a condition to avoiding it, and of a recovery of the amount due upon the note."

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6. *Black on Rescission and Cancellation*, 2d Ed., Vol. III, Sec. 616, at pp. 1484-5; *Thompson on Real Property*, Vol. III, Sec. 2846; *Burnham, Administrator v. Mitchell* (1874), 34 Wis. 117; *Dermott Land & Lbr. Co. v. Zelbicker* (C.C.A. 8, 1921), 271 F. 918 (cert. den. 257 U.S. 648, 66 L. Ed. 415); *Hale v. Kobbert* (1899), 109 Iowa 128, 80 N.W. 308; *Kruger v. Block* (1926), 114 Neb. 839, 211 N.W. 173; *Wright v. Dickinson* (1887), 67 Mich. 580, 35 N.W. 164; *Bank Savings Life Ins. Co. v. Steiner* (Tex. Civ. Apps. 1935), 81 S.W. (2d) 225; *Duson v. Pacific Improvement Co.* (C.C.A. 5, 1927), 18 F. (2d) 5; *Neblett v. Macfarland* (1876), 92 U.S. 101, 23 L. Ed. 471; *American Wine Co. v. Brasher Bros.* (Cir. Crt. Colo., 1882), 13 F. 595; *Hammond v. Pennock* (1874), 61 N.Y. 145; *Cohen v. Ellis* (1885, N.Y.), 16 Abbott's N.C. 320; *Waupin v. Missouri State Life Ins. Co.* (Kansas City Crt. Apps., Mo., 1919), 214 S.W. 398; *Green v. Security Mutual Life Ins. Co.* (1911), 159 Mo. App. 277, 140 S.W. 325; *Felt v. Bell* (1903), 102 Ill. App. 218, 68 N.E. 794; *Green v. Hopper* (Tex. Civ. Apps., 1925), 278 S.W. 286 (rehearing denied 1925); *McDonald v. Simons* (Tex. Com. App. 1926), 280 S.W. 571; *Burgess v. Burgess* (1925), 130 S.C. 265, 126 S.E. 34; *Wilks v. McGovern-Place Oil Co.* (1926), 189 Wis. 420, 207 N.W. 692; *King v. King* (1908), 111 N.Y.S. 713, 127 App. Div. 411; *Mather v. Barnes* (C.C. W.D. Penn., 1906), 146 F. 1000; *Jones v. Galbraith* (1900), 59 S.W. 350; *Cheves-Green & Co. v. Horton* (1933), 177 Ga. 525, 170 S.E. 491, 492; *Fields v. Union Central Life Ins. Co.* (1930), 170 Ga. 239, 152 S.E. 237; *Hamilton Ridge L. Corp. v. Boston Ins. Co.* (1925), 133 S.C. 472, 131 S.E. 22, 26; *Whiteley v. Downs* (1932), 174 Ga. 839, 164 S.E. 318, 320; *Williams v. Sapicha* (1901), 94 Tex. 430, 61 S.W. 115, 118; *Rea v. Bishop* (1894), 41 Neb. 202, 59 N.W. 555, 556; *Brown v. Brenner* (Tex. Civ. Apps., 1913), 161 S.W. 14, 16-17.

7. *Mather v. Barnes* (1906), 146 Fed. 1000; *McKenzie v. Donnell* (1899), 151 Mo. 431, 52 S.W. 214; 9 *C. J.* 1212, Sec. 100.

(2) That the resale at a profit of certain materials purchased under a contract calling for periodic deliveries was no impairment to restoration in cancelling the contract. *Dermott Land & Lbr. Co. v. Zelnicker* (C.C.A. 8, 1921), 271 Fed. 918, wherein the Court said, at p. 920:

> "The rule that the party who seeks to rescind a contract shall return whatever he has received thereunder, like other rules of justice, must be so applied in the practical administration of justice as shall best subserve in each particular case the undoing of wrong and the vindication of right."

(3) That the return of what was left of a farm, about one-half of which had been washed away by a change in the bed of the river, was sufficient. (*Hale v. Kobbert* (1899) 109 Iowa 128, 80 N.W. 308.)

(4) That no compensation need be made to a purchaser for improvements placed on the property because he did not prove that they enhanced the value thereof. (*Kruger v. Block* (1926), 114 Neb. 839; 211 N.W. 173).

(5) That the return of land was sufficient restoration, although timber had been cut therefrom, and it had been encumbered with a lease and a right of way for a railroad had been granted. (*Wright v. Dickinson* (1887), 67 Mich. 580; 35 N.W. 164.)

(6) That in cancelling an insurance policy and ordering the return of the premiums to the insured, the company although it had been subject to a risk during the period the policy was outstanding was being placed in substantially the same position as before the policy was issued. (*Bank Savings Life Ins. Co. v. Steiner*, (Tex. Civ. Apps., 1935) 81 S.W. (2d) 225.)

(7) That the return of the land purchased, less 80 acres resold to another, together with the sales price thereof was sufficient restoration. (*Duson v. Pacific Improvement Co.*, (C.C.A. 5, 1927), 18 F. (2d) 5.)

(8) That the return of a bond received as consideration was sufficient whether or not it had become less valuable or even unenforceable by the running of the statute of limitations. (*Neblett v. Macfarland* (1876), 92 U.S. 101, 23 L. Ed. 471.)

(9) That the return of 80 out of 100 cases of wine and the reasonable value of the 20 resold was sufficient. (*American Wine Co. v. Brasher Bros.* (Cir. Crt. Colo. 1882) 13 F. 595.)

(10) That in setting aside a deed the indemnification of the purchaser (a) for his warranty under another deed made by him in a resale of part of the property, and (b) for a mortgage assumed by him, was sufficient. (*Hammond v. Pennock* (1874), 61 N.Y. 145.)

(11) That the return of bonds which since the purchase had gone into default and the issuer thereof into receivership was sufficient. (*Cohen v. Ellis* (1885 N.Y.), 16 Abbott's N.C. 320.)

(12) That the existence of a greater insurance protection under a life policy since its purchase was no impediment to its cancellation by the insured and the reinstatement of a former policy. (*Maupin v. Missouri State Life Ins. Co.* (Kansas City Crt. Apps. Mo. 1919), 214 S.W. 398. See also *Green v. Security Mutual Life Ins. Co.* (1911), 159 Mo. App. 277; 140 S.W. 325.)

(13) That the return of an undivided one-third interest in a patent which since its purchase had lapsed for

non-user in France, though apparently good elsewhere, was, sufficient notwithstanding that the defendant had sold the whole interest in a single transaction, one-third to plaintiff and two-thirds to another. (*Felt v. Bell* (1903), 102 Ill. App. 218; 68 N.E. 794.)

(14) That the fact that of the property purchased the feed had been used and 60 head of livestock sold was no impediment to setting aside the sale, the Court having the authority to adjust the equities in its decree. (*Green v. Hopper* (Tex. Civ. Apps. 1925), 278 S.W. 286.)

(15) That the indemnification of a party for his assumption of an obligation to another is sufficient. (*McDonald v. Simons* (Tex. Com. App. 1926), 280 S.W. 571.)

(16) That the sale of timber and the granting of a right of way is no impediment to the cancellation of a partition agreement between co-tenants with respect to the property in question. (*Burgess v. Burgess* (1925), 130 S. C. 265; 126 S.E. 34.)

(17) That the return of a lot the house upon which had been destroyed since the purchase was made was sufficient. (*Wilks v. McGovern-Place Oil Co.* (1926), 189 Wis. 420; 207 N.W. 692.)

(18) That the dissolution of the marriage undertaken in consideration of the transfer of land was not necessary to recover back the property. (*Ring v. Ring* (1908), 111 N.Y.S. 713; 127 App. Div. 411.)

(19) That the return of mining property was sufficient restoration in a transaction wherein the seller had sold options on the property and subsequently the purchaser had exercised the options and acquired the property, the

Court requiring that the seller repay the cost to the purchaser of exercising the options, which cost was greatly in excess of the purchase price of the options. (*Mather v. Barnes* (C.C. W.D. Penn. 1906), 146 F. 1000.)

(20) That the return of so much of the purchase price as remained in the hands of the incompetent and a mortgage upon the property sold by him for the balance of such purchase price was sufficient. (*Jones v. Galbraith* (1900), 59 S.W. 350.)

In our cross-petition for certiorari we urged, and it will be the burden of this brief in support of the points made in that cross-petition, that no restoration whatsoever should be required in this case. If we assume, however, that the conduct of Waialua is such as to commend itself to a court of equity and to entitle it to restoration, then, we submit, that the decision of the Circuit Court of Appeals makes ample provision for Waialua.

Just before the deed of May 2, 1910 was obtained, Waialua was (a) the owner of certain undivided fractional interests in the Holt lands which it had purchased from other members of the Holt family (infra, p. 32), and (b) a lessee of all of the lands under the lease of 1905 for a term expiring April 1, 1930 (supra, p. 4) (R. 116). By the deed of May 2, 1910, Waialua acquired from the incompetent an undivided one-third remainder interest in the Holt tract and paid $30,000 therefor. Since it acquired the land, it has placed improvements thereon which have increased the value of the property. It has, of course, used these improvements to its advantage (R. 1278) in operating the land, and they may or may not now be

of as much value to the land as was their cost to Waialua. In setting aside the whole transaction the decision of the Circuit Court of Appeals requires, as a condition thereto, that the incompetent (a) repay the purchase price with interest from the date of its payment by Waialua, i.e. May 2, 1910; and (b) pay Waialua the amount by which the improvements have enhanced the value of the land being recovered, not, however, to exceed the cost of such improvements. We earnestly submit that this is restoration to status quo, within the meaning of the rule, to the fullest extent. Waialua will be in the same position in which it was before it acquired the incompetent's interest, namely a co-tenant in possession, owning all it previously did. It will until partition continue, as before, to utilize the land with all its improvements, being required only to pay a reasonable rent to its co-tenant. As the Circuit Court of Appeals points out (R. 1610-1616), Waialua paid nothing to the incompetent for or under the terms of the lease of 1905 or the instrument of 1906, and accordingly there is nothing to be restored with respect to either thereof. The term of the lease of 1905 has expired. The 1906 instrument, which as outlined was an assignment by the incompetent of her right to the rent provided for in the lease, has spent its force with the expiration of the lease. Had neither of them been made Waialua would have been required, as a co-tenant occupying the land to the exclusion of the incompetent, to pay her the reasonable rental value of her interest. The decree of the United States Circuit Court of Appeals, in effecting restoration to status quo upon a cancellation of all three instruments, provides for just that result. It places

Waialua in all respects where it would have been had it not acquired any interest in the property—either by the lease, the assignment, or the deed—from Eliza Christian.

(2) The consideration was not adequate.

While the decision of the Circuit Court of Appeals was not placed upon that ground, Waialua in fact did not pay an adequate consideration for the incompetent's interest.

The trial Court was of the view that the price, namely, $30,000, paid by Waialua was not adequate (R. 159). This, we submit, was a correct finding. It is true that in its first opinion the Supreme Court said that it could not agree that $30,000 was an inadequate price (R. 304), but that court also found that the incompetent never received the consideration (R. 294, 301), and set the deed aside because it was not beneficial to her—accordingly, its view of the value of the interest is of no importance. It should be observed that, in deciding the first appeal, the Supreme Court of Hawaii, as it explained in its second opinion (R. 371), had in mind the assignment of 1906, which it regarded as a transfer of all rents to accrue from the land during the incompetent's life. In passing on the issue of adequacy of price the Court was therefore considering the value of an interest supposedly burdened or diminished by the prior transfer of the grantor's right to all income to accrue during her entire life. But, as already pointed out (ante, p. 4, Fn. 2) the decision of the Circuit Court of Appeals, which is not, in this respect, attacked here, establishes that the 1906 instrument, if valid at all, is to be construed as transferring only the right to rents under the lease of 1905, which expired in 1930. It is apparent that

the interest which the Supreme Court considered had been transferred was not the interest which the incompetent actually sold. What she did sell was a much more valuable interest, one in fact which has now been held to have a reasonable rental value for each of the years from 1922, when the incompetent's title vested, to 1932, when the trial Court entered its decree, of approximately $40,000 per year (R. 505, 523). If we concede that the land sold by the incompetent in 1910, if subject to a burden of an instrument granting the rents, issues and profits thereof for the life of a party then twenty-five years old, was worth not more than $30,000, it by no means follows that the interest was not worth more than $30,000, when the burden was only an assignment of rents for twenty years, i. e., from 1910 when the deed was made to 1930 when the lease expired. We submit that the finding of the trial Court was correct, and refer to that Court's analysis of the facts with respect thereto (R. 149, 150), wherein the Court concludes that $71,778.20, and not $30,000.00, was the fair value of the incompetent's interest in the property in 1910. Waialua made the purchase at less than half price. Inadequacy of consideration is always recognized as a ground for setting aside incompetents' contracts.[8]

(3) Waialua was purchasing an expectancy and, regardless of the incompetency of Eliza Christian, the inadequacy of the price and the unfairness of the dealing entitle her to set aside the transaction.

Owners of expectant interests have long been the objects of protection by a Court of equity. As pointed

8. *Hull v. Louth* (1887), 109 Ind. 315, 10 N.E. 270; *McEvoy v. Tucker* (1915), 115 Ark. 430, 171 S.W. 888; *Maggini v. Pizzoni* (1888), 76 Cal. 63, 18 Pac. 687; *Potter v. Woodruff* (1892), 92 Mich. 8, 52 N.W. 83; 32 C.J. 746, Sec. 537, fns. 1 and 2.

out by Professor Pomeroy,[9] one of the foundations upon which this jurisdiction rests is the exposure of this class of persons to the temptation of sacrificing their future interests in order to meet present wants. That is what happened in this case. To sustain a transaction with one disposing of an expectancy, the buyer must prove fair dealing and adequacy of consideration.[10] Fraud is inferred from the nature of the transaction. The buyer must overcome the inference.[11] In this class of case, fraud means an unconscionable use of the powers arising out of the attendant circumstances and conditions. In the instant transaction, as already pointed out, the finding of the trial Court is that the consideration paid was not adequate (supra, p. 23). The whole course of the dealing culminating in the execution of the deed of May 2, 1910, is hereafter outlined in detail, from which it is clear that the purchase was made by Waialua through an agent, James L. Holt, who had knowledge of the incompetency (infra, p. 30). Beyond this the evidence clearly supports the trial Court's view that Waialua was not fair in the matter (R. 139-157). That Court said that in making

9. *Pomeroy's Equity Jurisprudence*, 4th Ed., Vol. II, Sec. 953, p. 2031.

10. *Story Equity Jurisprudence*, 14th Ed., Vol. I, Secs. 458-462, incl.; *Bacon v. Bonham* (1881), 33 N.J. Eq. 614; *Dixon v. Bentley* (1905), 68 N.J. Eq. 108, 59 Atl. 1036; *Nimmo v. Davis* (1851), 7 Texas 26; *Elliott v. Leslie* (1907), 124 Ky. 553, 99 S.W. 619; *McClure v. Raben* (1890), 125 Ind. 139, 25 N.E. 179; *Read v. Mosby* (1890), 87 Tenn. 759, 11 S.W. 940; *Mastin v. Marlow* (1871), 65 N.C. 695. This rule also prevails in England. *Halsbury's Laws of England*, (2d Ed., Vol. 15, p. 283, Sec. 505; *Chesterfield v. Janssen* (1750), 28 Eng. Repr. 82, 2 Ves. Sen. 125; *Gwynne v. Heaton* (1778), 28 Eng. Repr. 949, 1 Bro. C.C. 1; *Lancashire Loans Ltd. v. Black* (1934), L.R. 1 K.B. 380; *Nesbitt v. Berridge* (1863), 55 Eng. Repr. 111, 32 Beav. 282; *Earl of Portmore v. Taylor* (1831), 58 Eng. Repr. 69, 4 Sim. 182; *Newton v. Hunt* (1833), 58 Eng. Repr. 530, 5 Sim. 511; *Bromley v. Smith* (1859), 53 Eng. Repr. 1047, 26 Beav. 644; *Brenchley v. Higgins* (1900), 83 Law Times 751, 70 L.J. Ch. 788; *Aylesford v. Morris* (1873), 28 Law Times 541, 42 L.J. Ch. 6546; *Nott v. Johnson & Graham* (1687), 23 Eng. Rep. 627, 2 Vern. 26.

11. *Pomeroy's Equity Jurisprudence*, 4th Ed., Vol. II, Sec. 953, p. 2031.

the purchase Waialua "knew of the betrayal of confidence which was going on between James Lawrence Holt and Lawrence Kentwell affecting Eliza" (R. 153)—that "The company did everything in its power to prevent the question of values coming out in the open at the time" (R. 152). Far from engaging in an open and above-board transaction, directly with the seller, Waialua obtained her signature in a transaction negotiated by her cousin, James L. Holt, to whom it paid a compensation and which fact it hid from the incompetent and those dealing for her. As the trial Court found, Waialua "knew that James L. Holt was securing a secret profit to himself and Colburn * * *" (R. 148). Waialua was, nevertheless, very careful to keep this information from the seller. We quote its instructions to its attorney, Withington, who was sent to Oxford, England, to close the transaction. In a cable of April 12, 1910, it said (R. 934, Exh. D-21):

> ELIZA AND JOHN D ACCEPT THIRTY THOUSAND DOLLARS MUST BE INCLUSIVE OF PROSPECTIVE INTEREST ANNIE KENTWELL WANTS FIVE THOUSAND DOLLARS HER INTEREST MAKE LESS IF POSSIBLE MUST NOT EXCEED THIRTY-FIVE THOUSAND DOLLARS PRICE TO WAIALUA MUST BE KEPT SECRET (Underscoring ours).

One of the reasons given for the intervention of a Court of equity to relieve against sales of expectancies is the necessitous condition of the seller. In this case this very factor is present and Waialua knew it. We quote another of Waialua's cables to Withington, its attorney (R. 925, Exh. D-13):

> HAVE RECEIVED YOUR LETTER OF THE FOURTH EMPLOY ONLY IF NECESSARY LARNACH WAIALUA DEPENDS UPON YOU HAVE EVERY REASON TO BELIEVE LINK (meaning

McCandless, another prospective purchaser) WILL KEEP THEM SUPPLIED WITH MONEY PROVIDED THEY CAN COME AMERICA WHERE EXPECT TO MEET TRENT (McCandless' agent) WHY DO YOU NOT COMMUNICATE WITH KENTWELL BY CABLE TRY TO ASCERTAIN MOVEMENTS.

Waialua used its best efforts to keep the prospective purchaser, McCandless, *from negotiating for the incompetent's* interest, and pressed its advantage at every turn. We quote another of its cables to Withington sent April 28, 1910 (R. 940, Exh. D-27):

A DELAY IS DANGEROUS WE CONSIDER IT ADVISABLE CLOSE IMMEDIATELY BEFORE ARRIVAL TRENT (McCandless' agent) EXCLUDING INSURANCE CLAUSE HAVE DEEDS EXECUTED AT ONCE AND FORWARDED AETHORIZE YOU TO PAY LIZA THIRTY THOUSAND DOLLARS ANNIE FIVE THOUSAND DOLLARS ON TERMS SPECIFIED IN THEIR LETTER OF MARCH EIGHT MUST HAVE A DEFINITE REPLY McCANDLESS HAVE BEEN NOTIFIED OUR RIGHTS MUST BE UPHELD (Underscoring ours).

Its agent, Holt, wrote informing that a failure to sell would result in partition, with Waialua acquiring the property "at any old price they feel like paying; who all can oppose them successfully, we all have not got the money" (R. 915). As the trial Court pointed out, Waialua had actual knowledge of this threat (R. 143 and 147). We submit that, regardless of the incompetency, Waialua cannot sustain its purchase of an expectancy in a bargain such as this.

The recovery allowed the incompetent by the Circuit Court of Appeals is, as pointed out, amply sustained. Beyond that we earnestly contend that the recovery did not go far enough. The incompetent should not have been

required to make any restoration for the several reasons advanced in her cross-petition for certiorari, and clearly there is no need for any further finding on the issue of competency. We now turn to these points.

(B) THE DECISION SHOULD HAVE GRANTED THE INCOMPETENT GREATER RELIEF.

(1) Waialua is not entitled to be compensated for the improvements placed upon the land or to a return of the consideration paid for the deed because (a) it did not sustain its burden of proof that it was a bona fide purchaser and (b) it affirmatively appears that Waialua had knowledge of the incompetency through its agent, James L. Holt.

a. Waialua failed to sustain its burden of proof.

In order to establish its right to an allowance for improvements placed upon the property or the return of the consideration paid for the deed Waialua must have acted in good faith, it must have taken without knowledge of the incompetency of the seller.[12] The Circuit Court of Appeals recognized this rule (R. 1600), but declined to apply it because, it stated, the trial Court and the Supreme Court of Hawaii had each required restoration and "this could not have been done under any theory of the law other than that the company did not have notice. Thus, both have made an implied finding that the company did not have notice." (R. 1637). It was the gravamen of the incompetent's cross-petition for a writ of certiorari, and

12. *Elder v. Schumacher* (1893), 18 Colo. 433, 33 Pac. 175; *Studebaker v. Taylor* (1917), 83 Ind. 747, 80 N.E. 861, 170 Ind. 498, 83 N.E. 747; *Amos v. American Trust etc. Bank* (1906), 221 Ill. 100, 77 N.E. 462; *Fecht v. Freeman* (1911), 251 Ill. 84, 95 N.E. 1043; *Beckwith v. Cowles* (1913), 85 Conn. 567, 83 Atl. 1113; *Hardy v. Dyas* (1903), 203 Ill. 211, 67 N.E. 852; *Shindler v. Parzoo* (1908), 52 Ore. 452, 97 Pac. 755; *Bethany Hospital Co. v. Philippi* (1910), 82 Kan. 64, 107 Pac. 530; *Thrash v. Starbuck* (1896), 145 Ind. 673, 44 N.E. 543; 9 *C. J.*, 1216, Sec. 108, fn. 94.

will be the incompetent's position in this portion of the brief, that the Circuit Court of Appeals erred when it directed, as a condition to cancellation, that restoration be made to Waialua.

The burden of proving good faith is upon Waialua if it would seek the benefit thereof. [13] The record fails to disclose any attempt whatsoever to sustain this burden. In its first and second answers, filed in 1928 and 1929 respectively (R. 64, 101), Waialua did not plead that it was an innocent purchaser. In its third answer (R. 409), filed in 1931, which was after the trial in which the invalidity of the deed was determined, and before the trial on the remand from the Supreme Court of Hawaii with respect to the lease and the assignment, Waialua did so plead, but it did not offer any proof thereof. The finding of the trial Court was "that it is not clearly shown that Waialua Company had actual notice of the incompetency" (R. 154); the Court stated that it "proceeded on the assumption that Waialua was ignorant of her real mental status. But this fact does not justify the conclusion that the company was a 'subsequent grantee' or an 'innocent purchaser'" (R. 154). The Supreme Court of Hawaii, in its second opinion, stated that Waialua did not have knowledge of the incompetency (R. 555). The United States Circuit Court of Appeals assumed for the purpose of its decision that Waialua did not have knowledge of the incompetency (R. 1637). There is no evidence in the record from which a finding that Waialua did not have knowledge can be made.

13. *Ipock v. Atlantic etc.* (1912), 158 N.C. 445, 74 S.E. 352; *Curtis v. U. S.* (1923), 262 U.S. 215; 67 L. Ed. 956; *Wright-Blodgett & Co. v. U. S.* (1915), 236 U.S. 396, 59 L. Ed. 637; *Treat v. Rogers* (C.C.A. 8, 1929), 35 Fed. (2d) 77; *Hull v. Louth* (1887), 109 Ind. 315, 10 N.E. 270.

It was not necessary for any of the three Courts to find that Waialua had knowledge of the incompetency, and accordingly was not a bona fide purchaser, in order to grant the relief which has thus far been granted to the incompetent. It is a distasteful thing for a trial Court in a small community, such as Honolulu,[14] to find economically important people guilty of knowingly taking advantage of an incompetent. It is clear, however, from the opinion of the trial judge (R. 139-149) that he did not consider that it had been established that Waialua was an innocent purchaser. In fact, he states directly that such a conclusion is not justified (R. 154). Considered in the light of the rule placing the burden upon Waialua, the finding, in the absence of proof of such fact, should have been against Waialua on the issue,[15] and accordingly Waialua is not entitled to an allowance for the improvements placed on the property or a return of the consideration paid for the deed as directed by the Circuit Court of Appeals.

b. It affirmatively appears that Waialua had knowledge of the incompetency through its agent, James L. Holt, when it took the deed of 1910.

With all the earnestness at our command we advance what we deem is an unanswerable point in this case. Both the facts and the law are clear upon it and by virtue thereof not only is the recovery already awarded the incompetent sustained but in addition its application eliminates the requirement that restoration be directed as a

14. The population of Honolulu in 1910, including all nationalities, was only 52,183. (Fifteenth Census of the U. S., 1930 Population, Vol. I. Dept. of Com. Bureau of Census, p. 1237.)

15. *Golson v. Dunlop* (1887), 73 Cal. 157, 14 Pac. 576; *Campbell v. Buchman* (1874), 49 Cal. 362; 64 *C. J.* 1258.

condition to cancellation. The circumstances surrounding the 1910 purchase are replete with over-zealousness on Waialua's part. Every advantage was taken of the incompetent's condition and necessities to make a purchase at a price which the trial Court did not consider adequate (R. 139, 157). One of these circumstances was that Waialua made the bargain through its agent, James L. Holt, who, as the trial Court found, had knowledge of the incompetency. It follows as a matter of law from the facts so found that Waialua, the principal, had knowledge of the incompetency.

As outlined in the statement of the case, the incompetent acquired her interest in the land in question under the will of her grandfather, who died in 1862. She had a number of cousins, children of her father's two brothers, who also had undivided interests in the land. Upon the death in 1891 of one of these uncles, each of his nine children (R. 113) became the owner of a 1/27th undivided interest. It was shortly thereafter that Waialua evidenced a desire to acquire the Holt lands. Mr. Goodale, Waialua's General Manager, testified that "it would be fair to say that Waialua Plantation from the very outset (referring to 1898, R. 1238) planned if it could to acquire these Holt lands, and that the various negotiations and transactions that I undertook from the inception there, were taken with a view of ultimately securing those lands" (R. 1259-1260). In 1899 Waialua purchased its first 1/27th interest and became a tenant in common with the various heirs of the Holt tract (R. 1260). In 1900 Waialua purchased another 1/27th interest (R. 850, subd. 4). In 1905 Waialua leased the whole of the property from various parties in interest (R. 874). Later in the same year it purchased another

1/27th interest (R. 894 subd. 12), acting through and taking title in the name of J. R. Galt. Again in the same year it purchased another 1/27th interest (R. 894, subd. 13), acting through and taking title in the name of J. R. Galt.[16] In 1906 it purchased another 1/27th interest (R. 894, subd. 14), acting through and taking title in the name of J. R. Galt. In 1907 it purchased two 1/27th interests (R. 899, subd. 16), acting through and taking title in the name of D. L. Withington.

In 1910, therefore, prior to the bargain which is involved in this suit, Waialua owned an undivided 7/27ths interest in the Holt lands and held a lease on the whole thereof for a period ending in 1930. It then set out to acquire the incompetent's share. As the petition filed in the trial Court alleges (R. 8-10), and Waialua's answer admits (R. 65-66) in 1910 Waialua "entered into an arrangement" with Holt "for the acquiring of a two-thirds interest * * * including the share and expectancy of Eliza and the interest owned by said James L. Holt and understood that said James L. Holt would and did * * * secure the conveyance of the interest of said Eliza * * * so that said interest might be united with those which he had acquired from his father * * *."

Although this transaction for the purchase of the incompetent's property involved Waialua's advancing for the incompetent's interest some $30,000 before it received a conveyance from Holt of the title which was taken in his name, and although the complete transaction wherein Waialua would acquire a two-thirds interest in fee in the property called for an expenditure by it of $120,000, the

16. This was the interest which vested in Annie Kentwell on the death of her father, Owen J. Holt.

document evidencing the agreed relationship between Holt and Waialua in this "arrangement" was not produced by Waialua. There was such a document executed in 1910 (R. 1013). It was demanded by the plaintiff (R. 1011), but although a great many papers having to do with this rather involved transaction were available and introduced in evidence, somehow this very important document could not be located, and we must rely therefore upon secondary evidence of its contents to determine the real relationship between Waialua and Holt. Fortunately, we do have in evidence the testimony of one of the parties thereto—Holt—that the final agreement was substantially in accordance with a draft thereof (R. 1013, and see Exh. D-37, R. 948) which was prepared by Waialua's attorneys (R. 1011). Since the defendant did not offer testimony to contradict that of Holt, we must assume that the arrangement was as outlined in the draft. Furthermore, the transaction followed the provisions of the draft with such minuteness of detail that it would seem beyond question that the draft accurately outlined what was to be done. For the convenience of the Court, the document is set out in the Appendix to this brief, beginning at page 1. It provides that Holt should procure the incompetent's interest in the property, along with other outstanding interests, and convey it forthwith to Castle, who was admittedly the nominee of Waialua. Holt was to pay up to $40,000 for this interest, which Waialua was to advance. It was contemplated that Mr. Withington, of the firm of Castle & Withington, which the answer admits were Waialua's attorneys in the transaction (R. 412), might go to England, where the incompetent was living, to close the purchase.

An examination of the undisputed evidence will show that the agreement was followed to the letter, and consequently, whether we look to what they agreed to do or what they actually did, the conclusion is the same—that Waialua, through the agency of Holt, purchased the incompetent's interest as it had theretofore, through the agency of others, acquired several of the other undivided interests.

The record discloses that after discussing the matter with Mr. Castle and being instructed by him "to go ahead and negotiate with the parties in England" (R. 1010) Holt wrote to Lawrence Kentwell suggesting the possibility of a sale of the interest to Waialua. It appears from Kentwell's reply (R. 906, Exh. D-1) of April 19, 1909, that Holt had previously made a proposal, and Kentwell then makes a counter-proposal on behalf of the incompetent and her father who was then seventy years of age. Upon obtaining an expression from Kentwell of his willingness to dispose of the incompetent's property Holt transmitted the letter to Castle (R. 908-9, Exh. D-2). We next find Holt again writing to Kentwell on February 17, 1910 (R. 913-15, Exh. D-5), telling him that Waialua had definitely decided upon the conditions under which it would make the purchase of the two interests, the incompetent's one-third and Holt's one-third, concluding with the statement that "the Waialua people have intimated strongly that should his attempt upon their part to buy fail, they will resort to a suit in partition for the sale of the land at public auction * * * they will acquire the same on any old price they feel like paying; who can oppose them successfully, we all have not got the money" (R. 915). On March 18, 1910, Kentwell wrote to Holt stating

that the incompetent would sell for $30,000, and in addition that his wife, Annie Kentwell, who claimed some right through the incompetent's father, would join in the conveyance for an additional $5,000 (R. 915-16, Exh. D-6). On March 30, 1910, Kentwell again wrote to Holt (R. 919-20, Exh. D-8), urging haste if Waialua wished to acquire the property because another purchaser, Mr. McCandless, had made a better offer. This letter refers to a cable from Holt which had arrived the same day and another letter from Kentwell to Holt, but neither of these documents is in evidence and their contents do not appear. Quite evidently, however, they do not modify the tentative terms since Kentwell again refers to the total consideration of $35,000. The delay in consummating the purchase appears to have been Waialua's concern over obtaining the consent of the incompetent's husband, Albert Christian. This consent was necessary under the Hawaiian statute then in effect requiring a husband's consent to the sale of real estate by the wife (Revised Laws of Hawaii, 1925, Sec. 2993).

The difficulty regarding the consent of the incompetent's husband was overcome on April 7, 1910, when Castle, who admittedly was acting for Waialua (R. 412), obtained an agreement from Christian that he, Christian, would, for a further consideration, at Castle's direction, give his consent to the purchase of the incompetent's interest (R. 902, subd. 19). It is of interest to note that this agreement in no way provides a minimum price at which the purchase is to be made. Christian apparently was not concerned with protecting the incompetent. As the trial Court stated, there was no one to whom she could look for disinterested information or advice (R. 155-6). The incompetent was

married to Christian in 1903, when she was seventeen years of age, and lived with him only a few months (R. 845). He died in 1919.

On April 8, 1910, Castle & Withington advised Mr. Goodale, Waialua's General Manager, that the Christian agreement had been procured, that Waialua had paid for it, and that Holt had cabled Kentwell that Christian had been settled with, and Withington would soon be in England (R. 920-21, Exh. D-9).

It is to be observed that Waialua's admitted representative, Castle, and not Holt, was the one to whom this agreement of Christian ran, and that Waialua, not Holt, paid for it. On the same day, April 8, 1910, Castle & Withington cabled Withington, in Boston, that "John" (meaning Holt) had cabled Kentwell to await his (Withington's) arrival, and urged Withington to go to London (R. 922, Exh. D-10). On the 11th of April, 1910, Castle & Withington again cabled Withington to hurry, since McCandless, another prospective purchaser, was also sending an agent to London (R. 922, Exh. D-11).

On April 12, 1910, Mr. Colburn, an associate of Holt, addressed a letter to Mr. Castle, outlining the terms of the transaction which was being consummated (R. 923-4, Exh. D-12). There is no question whom Mr. Colburn considers to be the real purchaser of the incompetent's interest. He makes his views clear when he states that in the event "that the said company (referring to Waialua) has acquired from Mrs. Eliza Christian her anticipatory interest in said lands" (R. 923) that it pay him and Holt the difference between the amount which it was required to pay to the incompetent, not to exceed

$30,000, and the sum of $60,000. The final agreement between the parties differed somewhat from that outlined in this letter, but it is of interest to note whom one of the persons acting thereunder considered to be the real purchaser.

On April 12, 1910, Castle & Withington in Honolulu cabled Withington, in Boston, as follows: "HAVE RECEIVED YOUR LETTER OF THE FOURTH EMPLOY ONLY IF NECESSARY LARNACK WAIALUA DEPENDS UPON YOU HAVE EVERY REASON TO BELIEVE LINK (meaning McCandless) WILL KEEP THEM SUPPLIED WITH MONEY PROVIDED THEY CAN COME AMERICA WHERE EXPECT TO MEET TRENT (McCandless' agent) WHY DO YOU NOT COMMUNICATE WITH KENTWELL BY CABLE TRY TO ASCERTAIN MOVEMENTS" (R. 925, Exh. D-13).

On April 13, 1910, Mr. Colburn wrote to Mr. Castle (R. 925-7, Exh. D-14), setting out the contents of a cable sent by Holt to Kentwell, and a copy of Kentwell's reply. The former was "AWAIT WITHINGTON'S ARRIVAL WITH CASH TERMS YOUR LETTER EIGHTH ACCEPTED CABLE IMMEDIATE ACCEPTANCE", and the latter was "ACCEPT WHEN DID WITHINGTON SAIL". Colburn states further, "Therefore the matter is up to you to instruct Withington to advise Kenwtell when he can sail for England and, if possible, to proceed forthwith, and you should make your financial arrangements whereby Mr. Withington will get the requisite amount, $30,000, to pay Mrs. Christian and the Kentwells and secure their deed. I take this to be exceedingly good prospects for the W. A. Co. to clinch this matter if there are no further delays upon the part of your principals."

On the same day, April 13, 1910, Castle & Withington in Honolulu cabled Withington, in Boston, that Kentwell had cabled his acceptance and that Withington's credit had been increased to $40,000 (R. 927, Exh. D-15).

On April 14, 1910, Withington, from Boston, advised Castle & Withington, in Honolulu, that he would sail on the 20th, that he wished more definite instructions, and asked if he might consult Professor Gray (R. 928, Exh. D-16).

On April 15, 1910, Castle & Withington, in Honolulu, cabled Withington, in Boston, to obtain Professor Gray's opinion (R. 933, Exh. D-19), and the same day Mr. Withington, in Boston, addressed a letter to Professor Gray (R. 928-30, Exh. D-17), asking Professor Gray's opinion, among other things, as to the nature of the incompetent's interest, and what type of conveyance was necessary in acquiring it.

On April 16, 1910, Professor Gray gave his opinion to Mr. Withington (R. 931-33, Exh. D-18), advising that the incompetent's interest was a contingent remainder, that any ordinary form of deed was sufficient to convey it, and that children that might be adopted by the incompetent's father would not take under the terms of the will.

On the 16th of April, 1910, Castle & Withington, in Honolulu, cabled Withington, in Boston, as follows: "ELIZA AND JOHN D ACCEPT THIRTY THOUSAND MUST BE INCLUSIVE OF PROSPECTIVE INTEREST ANNIE KENTWELL WANTS FIVE THOUSAND HER INTEREST MAKE LESS IF POSSIBLE MUST NOT EXCEED THIRTY FIVE THOUSAND PRICE TO WAIALUA MUST BE KEPT SECRET" (R. 934, Exh. D-21).

On April 19, 1910, Castle & Withington, in Honolulu, cabled Withington, in Boston, as follows: "KENTWELL SENDS FOLLOWING MESSAGE TO HOLT QUOTE WILL AGREE TO ABIDE BY YOU THOUGH LINK (meaning McCandless) OFFERS A BETTER PROPOSITION" (R. 935, Exh. D-22).

Withington sailed for London and we find under date of April 25, 1910, a letter from Kentwell to Withington, addressed to the steamer, welcoming Withington, and stating that he is expected in Oxford where the incompetent and her father are living with the Kentwells (R. 935-6, Exh. D-23).

On April 26, 1910, Withington, in London, cabled Castle & Withington, in Honolulu, as follows: "DEMAND PAYMENT IN CASH ARE NOW OBJECTING INSURANCE WE DO NOT CONSIDER IT ADVISABLE WITHOUT TRENT (McCandless' agent) WILL NOT ARRIVE UNTIL MONDAY" (R. 938, Exh. D-25).

On April 28, 1910, in Honolulu a letter was apparently sent over Holt's signature, after conferring with Castle (Holt's testimony, R. 1011), warning McCandless not to interfere with the pending transaction with the incompetent (R. 939, Exh. D-26).

The same day Castle & Withington, in Honolulu, cabled Withington, in London, "A DELAY IS DANGEROUS WE CONSIDER IT ADVISABLE CLOSE IMMEDIATELY BEFORE ARRIVAL TRENT (McCandless' agent) EXCLUDING INSURANCE CLAUSE HAVE DEEDS EXECUTED AT ONCE AND FORWARDED AUTHORIZE YOU TO PAY LIZA THIRTY THOUSAND ANNIE FIVE THOUSAND ON TERMS SPECIFIED THEIR LETTER MARCH EIGHTH MUST HAVE DEFINITE REPLY MCCANDLESS HAVE BEEN NOTIFIED OUR RIGHTS MUST BE UPHELD" (R. 940, Exh. D-27). It will be

observed that Castle & Withington referred to Holt's letter of the same day to McCandless as a notification that "our" (quite evidently meaning Waialua's) rights must be upheld. The office of Castle & Withington also apparently considered Waialua the real party in interest and that a notification by Holt was equivalent to a notification by Waialua.

On April 29, 1910, Withington, in London, cabled Castle & Withington, in Honolulu, as follows: "DEEDS WILL BE EXECUTED MONDAY AS FAR AS WE UNDERSTAND HAVE INSTRUCTIONS TO PAY WITHOUT THE SIGNATURE OF HUSBAND" (R. 941, Exh. D-29). On the same day Castle & Withington replied as follows: "YOUR UNDERSTANDING IS CORRECT" (R. 943, Exh. D-32).

A detail had apparently been overlooked for on the next day, April 30, from London, Mr. Withington cabled Castle & Withington, in Honolulu, inquiring who was to be named as the grantee in the deed (R. 943, Exh. D-33), and on the same day Castle & Withington replied by cable "JAMES LAWRENCE HOLT" (R. 943, Exh. D-34).

This is the documentary evidence showing the progress of the negotiations leading up to the execution of the deed of May 2, 1910, cancellation of which is sought in this action, and through which Waialua now claims. The chain of events follows with the minutest detail the provisions of the agreement between Holt and Waialua, testified to by Holt and set out in the memorandum dated April 15th (Exh. D-37, R. 948-52). From the time when the first discussions were initiated with Kentwell by Holt, to the execution of the deed and the payment of the consideration, we submit it is clear that

the real purchaser was Waialua, and that Holt was acting merely as its agent in procuring the property. We have, first, Castle's direction to Holt to negotiate with Kentwell; then Holt's letters to Kentwell in which he continuously mentions Waialua as the purchasing party; Kentwell's letters to Holt concerning the transaction in which he again refers to Waialua as the purchaser; Colburn's letter to Castle in which it is clear that he considers Waialua as the purchaser; Castle obtaining an agreement from Christian to consent to the purchase of the incompetent's interest; the cablegrams from Castle & Withington in Honolulu to Withington in Boston, directing him in great detail on the manner in which the transaction is to proceed, telling him that the price to Waialua must be kept secret—that McCandless has been notified that "our" rights must be upheld—directing him to whom the deed should run; and we have Waialua paying the purchase price and then settling with Holt and Colburn in accordance with the agreement, the draft of which is dated April 15th and set out as Exhibit D-37 (R. 948 to 952). In this very agreement, which Holt testifies was prepared by Castle, Castle, who admittedly is acting throughout on behalf of Waialua, is named as the buyer. Waialua, not Holt, was the purchaser of Eliza's interest. Holt was only the "dummy" grantee.

The events transpiring subsequent to the execution of the deed of May 2, 1910, throw further light on the relative position of Holt and Waialua in the transaction.

Holt testified (R. 1015-16), and his testimony is uncontradicted, that he never saw the deed of May 2, 1910 until the day he gave his testimony in 1929. Waialua's representatives offered no testimony as to what happened

to the deed. The record shows, however, that Albert Christian acknowledged his signature to the deed in San Francisco on May 16, 1910, whereas the signatures of the other parties thereto were obtained and acknowledged in London. Apparently the deed was sent to San Francisco by some one other than Holt for signature by Christian, just as some one other than Holt procured the signature of the incompetent. From the Deputy Registrar of Deeds in Hawaii (R. 1124) we learn that the deed was offered for record by Mr. Castle's office on June 23, 1910, and later returned to him, and that before this date, and on May 31, 1910, Mr. Castle offered for recordation a deed of May 28, 1910, from Holt to Castle as trustee, conveying all of the interest acquired by him under the May 2nd deed from the incompetent. So we find that Holt, before he had even seen the deed from the incompetent to him, had conveyed to Waialua's admitted representative all of the interest which he had acquired thereunder, and this second deed was a matter of record before the first one.

The bargain is now complete; the incompetent has conveyed away her property; Waialua has acquired it, having paid Kentwell $30,000 therefor; and Holt has performed his function as the intermediary, having passed along to Waialua all he acquired from the incompetent. Since there were several interests transferred together, it is difficult to ascribe any definite amount to Holt's undivided one-third remainder, although he placed it at $60,000 (R. 1014 and 852). Suffice it to say it was a condition precedent to Waialua's commitment to purchase Holt's interest that he get the incompetent's for them, and they paid in all $120,000 of which $30,000 went to Kentwell for the incom-

petent, $5,000 to Annie Kentwell for her good offices, and the balance of $85,000, less expenses, to Holt and Colburn as his trustee. (Ans. paragraphs 10 and 11, R. 68). It is clear that Holt was paid, and well paid, for his services, whether we view his reward as a commission for obtaining the incompetent's interest, or as an increased price for his own interest. We submit that Holt acted as Waialua's agent in acquiring the incompetent's interest in the property; that Waialua was the real party in interest and Holt its dummy.

The finding of the trial Court, which is not disturbed by the Supreme Court or the Circuit Court of Appeals, is that Holt acted for Waialua in this deal. It stated (R. 112):

> "Stripped of verbiage and incidental issues • • • the amended petition, in the light of admissions made during the trial, alleges that on May 2, 1910, respondent Waialua Agricultural Company, Limited, • • • *procured a conveyance to be executed for its benefit* by the petitioner • • •." (Italics ours.)

The trial Court referred to Holt as the "dummy grantee" (R. 148); that he was "simply an instrument in the securing of title by Waialua" (R. 473); that Waialua "took over and completed, as their own, the negotiations of James Lawrence Holt" (R. 482).

As the trial Court said (R. 147):

> "What the situation would now be if Waialua Company had been content to deal with James L. Holt at arms length, only, after he, Holt, had acquired the rights of Eliza is not the question before this Court."

and again (R. 155):

> "The fact is that Waialua Company in its haste to close the purchase, took direct charge of the transaction; and, while attempting to preserve the form of a secondary position, it in substance became the purchaser in fact. It does not qualify as a 'subsequent grantee'."

Indeed, we need not speculate upon the question, for the record contains a stipulation which removes all doubt. It is as follows:

> "Counsel for Waialua then admitted that the purchase of May 2, 1910 was made originally for the benefit of Waialua Company and that the series of transactions subsequent thereto gave the respondent no different status than it had by virtue of the deed of May 2, 1910 (Exh. A-21)." (R. 1061).

The conclusion of law which flows from the fact that Holt was Waialua's agent is that Waialua is charged with his knowledge with respect to all matters touching his agency, including his knowledge of Eliza's mental condition. The knowledge of an agent existent at the time of the transaction, no matter when acquired, is imputed to his principal. The record is clear that Holt, at the time he negotiated the purchase, knew that Eliza was incompetent. He so testified (R. 1014). He further testified that he had known of her incompetency since her birth (R. 1009), which, of course, included her condition in 1906 when she entered into the instrument of that date, through which Waialua now claims and which is also in question. The trial Court found that he had knowledge of Eliza's incompetency (R. 133; R. 481, 482, 492). This finding is undisturbed either by the Supreme Court or the Circuit Court of Appeals.

The authorities are abundant upon the proposition that the agent's knowledge, existing at the time of the transaction, is imputed to the principal.[17]

The underlying agreement, which was held in *Curtis v. United States* (Fn. 17, p. 45) to render the nominal purchaser of the property the agent of the real buyer, with the result that the real buyer was charged with the nominal purchaser's knowledge, is in so many respects similar to the one in the instant case (R. 948, Exh. D-37) that we include it in the Appendix, at page vi. The *Curtis* case in the Circuit Court of Appeals is reported as *United States v. Cooksey* (C. C. A. 9, 1921) 275 Fed. 670, and we have procured the agreement in question from the record in that case. We earnestly submit that the two cases are parallel upon their facts, and the rule applied in the *Curtis* case should be applied here. Holt's knowledge of the incompetency is imputed to Waialua, his principal; accordingly, Waialua is not a bona fide purchaser, and in setting aside the transaction it is not entitled to an allowance for improvements which it placed upon the property or a return of the consideration paid for the deed. In fact, it has been held by this Court that the contract of an incompetent with one who has knowledge of the incompetency is absolutely void and a nullity. *(Kendall v. Ewert* (1922), 259 U. S. 139, 66 L. Ed. 862. This is also the view of the Supreme Court of

17. *Veazie v. Williams* (1849), 8 How. 134, 12 L. Ed. 1018; *Harrington v. U. S.* (1871), 78 U.S. 356, 20 L. Ed. 167, 170; *J. J. McCaskill Co. v. U. S.* (1910), 216 U.S. 504, 54 L. Ed. 590; *Armstrong v. Ashley* (1907), 204 U.S. 272, 51 L. Ed. 482; *Curtis v. U. S.* (1923), 262 U.S. 215, 67 L. Ed. 956; *Pollman v. Curtice* (C.C.A. 8, 1919), 255 Fed. 628; *Kean v. National City Bank* (C.C.A. 6, 1923), 294 Fed. 214; *U. S. v. Cooksey* (C.C.A. 9, 1921), 275 Fed. 670; *Connecticut Fire Insurance Co. v. Commercial National Bank of San Antonio* (C.C.A. 8, 1937), 87 Fed. (2d) 968; *Brown v. Cranberry Iron & Coal Co.* (C.C.A. 4, 1896), 72 Fed. 103.

Hawaii. *Kailikia v. Hapa* (1901), 13 Haw. 459.) A person dealing with an incompetent, knowing of the incompetency, is guilty of fraud. *Story Equity Jurisprudence* (14th Ed.) Vol. I, Sec. 317:

> "Such persons being incapable in point of capacity to enter into any valid contract or to do any valid act, every person dealing with them, knowing these incapacities, is deemed to perpetrate a meditated fraud upon them and their rights. And surely if there is a single case in which all the ingredients proper to constitute a genuine fraud are to be found it must be a case where these unfortunate persons are the victims of cunning, the avarice, and corrupt influence of those who would make an inhuman profit from their calamities."

Not only, therefore, did Waialua fail to sustain its burden of proof that it was a bona fide purchaser, but beyond that it affirmatively appears that Waialua had knowledge of the incompetency through its agent Holt. Waialua then is not entitled to any allowance for improvements placed on the land or to a return of the consideration paid for the deed.

Regardless of the fact of Holt's agency and Waialua's consequent knowledge of the incompetency, the tactics used by Waialua in obtaining the incompetent's signature, we submit, do not commend themselves to a Court of Equity. The trial Court's view of Waialua's conduct is expressed in no uncertain terms in its opinion (R. 139-157). Measured by the rule of fairness required of one dealing with the owner of an expectancy (supra, p. 24), this transaction clearly can not stand even if Eliza Christian were not incompetent.

(2) Waialua is not entitled to recover the amount paid by it for the deed because the incompetent never received the same.

The basis of the rule requiring restoration as a condition to cancellation where the incompetency is not known to the other contracting party is that the incompetent seeking the aid of equity must do equity, and to retain benefits flowing to him in the transaction and at the same time to set aside the transaction and recover back what he had parted with would not be doing equity. (9 C. J. 1216, fn. 108). The measure of restoration, where it is decreed, is the amount received by the incompetent—not the sum with which the other party may have parted.[18] If the incompetent did not receive the consideration given for his property he is not required to reimburse the purchaser for what the purchaser may have parted with.[19] Here Waialua paid $30,000 for the interest of the incompetent, but the finding is that the incompetent never received that sum or any part thereof (R. 294, 301). Under these circumstances restoration of this sum should not have been made a condition to cancellation of the deed.

18. *McKenzie v. Donnell* (1899), 151 Mo. 431, 52 S.W. 214; *Hull v. Louth* (1887), 109 Ind. 315, 10 N.E. 270.

19. *Jordan v. Kirkpatrick* (1911), 251 Ill. 116, 95 N.W. 1079; *Hughes v. Cream* (1929), 178 Minn. 545, 227 N.W. 654.

(3) Waialua is not entitled to be compensated for the improvements placed upon the property or to receive back the amount paid by it for the deed, even though it be assumed that it acted in good faith, because the rule of decision in the Federal Courts, which is the rule of decision in this case arising in the Territory of Hawaii, is that contracts of incompetents are void in the sense of being nullities, and accordingly restoration is not a requisite to relief therefrom.

The rule of decision in this suit must necessarily be the rule prevailing in the Ninth Circuit Court of Appeals and the Supreme Court of the United States because those Courts are the ones to which appeals lie from the judgments and decrees of the Hawaiian Courts. (*Judicial Code* §128, U.S.C. Tit. 28, §225, Subd. 4.) As heretofore pointed out,[20] this proposition has nothing whatsoever to do with the rule laid down in *Swift v. Tyson* (1842), 16 Pet. 1, 10 L. Ed. 865, which was overruled by *Tompkins v. Erie R. R. Co.* (1938), 82 L. Ed., (Ad. Op.) 787. It has long been recognized and followed by both the Hawaiian Courts and the Circuit Courts of Appeal, in dealing with appeals from territorial Courts.[21] This proposition is of substantial importance in this case since, we submit, that the prevailing rule in this Court and in the Circuit Courts of Appeal is that the contracts of an incompetent are void in the sense of being absolute nullities, and accordingly, the incompetent is not required to make any restoration or allowance for improvements to obtain judicial relief therefrom. (*Dexter v. Hall* (1873), 82 U. S. 9, 21 L. Ed. 73; *Kendall v. Ewert* (1922), 259 U. S. 139.

20. See note, page 16.

21. *Kapiolani Estate v. Atcherley* (1913), 21 Haw. 441; *Territory v. Ho Mc* (1922), 26 Haw. 331; *Colburn v. U. S. F. & G. Co.* (1920), 25 Haw. 536; *Hill v. Carter* (C.C.A. 9, 1931), 47 Fed. (2d) 869 (Cert. den., 284 U.S. 625); *Successors of Fantanzzie v. Municipal Assembly* (C.C.A. 1, 1924), 295 Fed. 803.

66 L. Ed. 862; *Plaster v. Rigney* (C. C. A. 8, 1899), 97 Fed. 12.)

(C) THE CIRCUIT COURT OF APPEALS IS IN ERROR IN REMANDING THE CAUSE FOR A DETERMINATION OF COMPETENCY IN 1905, WHEN THE LEASE WAS EXECUTED, AND IN 1906, WHEN THE ASSIGNMENT OF RENTS WAS EXECUTED, BECAUSE (1) THERE HAS ALREADY BEEN A FINDING BY THE TRIAL COURT OF INCOMPETENCY ON THOSE DATES, WHICH FINDING HAS BEEN CONFIRMED BY THE SUPREME COURT OF HAWAII AND THE CIRCUIT COURT OF APPEALS, AND (2) THE EVIDENCE IN THE RECORD COVERS THE WHOLE OF THE LIFETIME OF THE INCOMPETENT, AND IF THERE HAD BEEN NO FINDING ON THE QUESTION, THIS EVIDENCE COMPELS A FINDING OF INCOMPETENCY NOW BY THIS COURT.

In remanding the suit for a determination of the issue of incompetency in 1905 and 1906, when the lease and assignment, respectively, were executed, the United States Circuit Court of Appeals has, we submit, fallen into error. There have been two trials (R. 111, 163, 472), two appeals to the Supreme Court of Hawaii (R. 202, 547), and two appeals to the United States Circuit Court of Appeals (52 F. (2d) 847) and (93 Fed. (2d) 603, 94 Fed. (2d) 806—R. 1586 and 1633) in this suit. The trial Court, on the first trial, found that the incompetent was "both before and at the time of the conveyance * * * and ever since has been and still is incompetent to the extent of having been incapable of understanding and acting in the ordinary affairs of life * * *." (R. 136); that she "has never been competent mentally to execute a conveyance of property" (R. 157); that she "was incompetent during the entire period from and before 1910 to date." (R. 157). The Supreme Court of Hawaii, on the first appeal, confirmed this finding, saying (R. 272-3):

> "The overwhelming weight of the evidence requires us to find, and we do find, that on May 2, 1910, Elia Christian was and at all times has been mentally incompetent to execute a deed or to understand its purpose or effect, or to engage in any business transaction of consequence. She was feeble-minded. Born in 1885, in May, 1910 she had the mentality of a child of not more than five or six. * * * In short, we find that at the date of the deed she was a congenital imbecile."

The Supreme Court of Hawaii was of the view that the validity of the lease and assignment had not been at issue in the first trial (R. 323, 324) and remanded the cause (R. 326) to the trial Court for the taking of additional testimony, touching the circumstances surrounding the execution of these documents, excluding, however, the question of competency. The evidence on the question of competency at the first trial had covered the whole of the incompetent's life. It is reviewed at length by the trial Court (R. 116 to 134) and by the Supreme Court on the first appeal (R. 202 to 273). The latter Court, in its opinion, considered the evidence by periods of the incompetent's lifetime, and one of these periods, from 1902 to 1906, covers the very time during which the lease and the assignment were executed (R. 220). That Court concluded from all of the evidence that she was a "congenital imbecile" (R. 273).

In limiting the remand the Supreme Court clearly believed the evidence and the findings adequate on the question of competency in 1905 and in 1906, for otherwise it would have directed a determination of that issue. At the trial on the remand the trial Court followed the

direction of the Supreme Court and refused to hear additional testimony on the question of competency (R. 1477). The trial Court said, in its opinion on the remand, "Hearings were had in which it was ruled that the congenital imbecility of petitioner had been found heretofore both by this Court and the Supreme Court and would not be reopened" (R. 476), and again, in discussing the lease of 1905, "Eliza Christian was at all times a congenital imbecile, incompetent to enter into a contract of such a character * * *" (R. 491). The Supreme Court on the second appeal confirmed the trial Court's interpretation of the remand order (R. 552), and again concluded that she was a "congenital imbecile" (R. 552). The Supreme Court then proceeded to deny relief against the assignment of 1906 and the lease of 1905, *regardless of the incompetency* of Eliza Christian (R. 555). As the opinion of the Circuit Court of Appeals declares (R. 1618), 116 witnesses have already testified on the issue of competency, touching the whole of the petitioner's life. It is beyond question that one who is a congenital imbecile in 1910 cannot have been competent in 1905 or 1906, and all three Courts concur on the finding of congenital imbecility.

The limitation in the order of remand by the Supreme Court of Hawaii to exclude further evidence on the issue of competency was well within its power. (Revised Laws of Hawaii 1935, Sec. 3503.) Having once made that order, it became the law of the case in so far as that Court was concerned. (*Thompson v. Maxwell etc.* (1897), 168 U. S. 451, 42 L. Ed. 539.)

The statement of the Supreme Court of Hawaii, on the second appeal, that it thought it erred in restricting the

evidence (R. 553) does not lessen the finality of its first order. The Circuit Court of Appeals was, and this Court is, of course, in no way bound by the limitation of the remand order if it is believed that the Supreme Court of Hawaii abused its discretion in so limiting the evidence. A reading of the opinion of the Circuit Court of Appeals directing a remand on this issue is, we believe, most convincing that that Court does not believe that there is any deficiency in the evidence on the question of competency in 1905 and 1906. The Circuit Court of Appeals, we submit, fell into error in concluding that there was no finding on that issue. There was, as we have quoted from the record, an adequate finding, but if there were not, the record is sufficiently complete and convincing to warrant a finding by this Honorable Court that the petitioner, having been found to be a "congenital imbecile" in 1910, was also incompetent in 1905 and 1906.

If, in truth, the Supreme Court of Hawaii was in error in limiting the order of remand, we respectfully submit that it was harmless error and should not necessitate a reversal of the trial Court's decree that the lease and assignment are both invalid. (*Judicial Code* §269, U.S.C. Tit. 28, §391.) Any new evidence will be merely cumulative. 116 witnesses on an issue resulting in a finding of congenital imbecility should be enough.[22]

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22. *Drumm-Flato Com. Co. v. Edmission* (1908), 208 U.S. 534, 52 L. Ed. 606, 609; *Berio v. Gay* (C.C.A. 1, 1921), 272 Fed. 404, 409; *Johnsonburg Vitrified Brick Co. v. Yates* (C.C.A. 3, 1910), 177 Fed. 389, 391; *Pocahontas C. C. Co. v. Johnson* (C.C.A. 4, 1917), 244 Fed. 368, 374 (Cert. den. 245 U.S. 658, 62 L. Ed. 535); *Mounts v. Apt.* (1911), 51 Colo. 491, 119 Pac. 150, 151-2.

CONCLUSION.

We respectfully submit that the incompetent should not be required to make any restoration to Waialua as a condition to cancelling these instruments, and that there is clearly no necessity for a further finding by the trial Court on the issue of competency in 1905 and 1906.

Dated, San Francisco, California,
September 12, 1938.

M. C. SLOSS,
CHARLES M. HITE,
Attorneys for Eliza R. P. Christian,
An Incompetent Person.

E. D. TURNER, JR.,
CHARLES E. FINNEY,
SLOSS, TURNER & FINNEY,
Of Counsel.

(Appendix Follows.)

Appendix

D-37. Original unsigned draft of agreement dated April 15, 1910, between James L. Holt, John F. Colburn and William R. Castle, Trustee, regarding sale of two-thirds interest in Holt lands for $120,000.

(This original exhibit, being impossible to describe accurately, is by order of the Supreme Court of Hawaii made a part of this record and incorporated herein by reference.)

THIS AGREEMENT, made this 15th day of April, A. D. 1910, between JAMES L. HOLT, of the City and County of Honolulu, Territory of Hawaii, of the first part, hereinafter referred to as "Holt" or "J. L. Holt", JOHN F. COLBURN, of said Honolulu, of the second part, hereinafter referred to as "Colburn" or "John F. Colburn", and WILLIAM R. CASTLE, TRUSTEE, of said Honolulu, of the third part, hereinafter referred to as the "Buyer",

WITNESSETH THAT:

Whereas, upon an understanding and agreement that said Holt should acquire all of the rights, interests or shares of Eliza Christian, John D. Holt and Annie Kentwell, present or prospective, in and to the lands of the Estate of R. W. Holt, Deceased, situate in the District of Waialua, in said City and County of Honolulu, and should convey such rights, interests and shares to such person or persons, association or associations, corporation or corporations as the said Buyer should direct; and that said Holt and Colburn (the latter acting under a trust deed) should convey all of the right, share or interest, present or prospective, of said Holt in and to said lands of said Estate

of R. W. Holt, Deceased, in said District of Waialua, which interests, shares and estates shall not be less than two (2) full thirds of said property, free from all life or other intermediary estates or encumbrances; and said Buyer has already expended and will hereafter expend large sums of money to secure the said shares and interests as aforesaid, or part of them, and to perfect all titles thus acquired or to be acquired which are to be sold and conveyed as upon the above understanding and agreement:

NOW, THEREFORE,

Said Holt and Colburn, in consideration of such expenditure so made and to be made hereafter at their or either of their requests, and of One Dollar to each of them paid by said Buyer, the receipt whereof is acknowledged, do hereby promise, covenant and agree to and with said Buyer:

1st. To proceed without delay and as rapidly as possible with all and every negotiation and proceeding necessary to secure such shares, titles and interests of said Eliza Christian, John D. Holt, Annie Kentwell, and all and every intermediate estate and other title necessary to be acquired, secured or extinguished in order to vest a full two-third (⅔) share or interest, free from all incumbrances, in said James L. Holt, either personally or as trustee; and *to expend if necessary up to $40,000 in so doing and

2nd. That, when so secured, all of said shares or interests, or, if not so fully secured, then such part or portions

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*Beginning with "to" and to end of paragraph written in ink in longhand.

thereof as may be possible to secure and to be conveyed to said Holt personally or as Trustee, to sell and convey
2. by good and sufficient deed or deeds of conveyance, with full releases of dower, at the expense of said Buyer, to such person or persons, association or associations, corporation or corporations, as said Buyer shall direct, for the consideration of One Hundred Twenty Thousand Dollars ($120,000) for such full two-thirds (⅔) unincumbered interest, at and after said rate for any part thereof which may be secured.

From the consideration to be paid by such persons, associations or corporations as aforesaid the said Buyer may first deduct all moneys by him paid, or paid on his account, or to be paid hereafter, including the legal interest, on
1 account of these proceedings from the inception thereof until every title shall be secured as aforesaid, and also all moneys due to him, the said Buyer, for loans and advances made to or on account of either said Holt or Colburn; excepting, however, the expense of the trip of David L. Withington to England in this behalf, such trip to be made in or about the month of April, 1910.

And the Said Buyer agrees that upon notice by him received that said shares or interests in said lands in said Waialua have been secured by said James L. Holt, either personally or as trustee, or in any way in his behalf, he will then and thereupon give notice to said parties of the first and second part to what persons, associations or corporations the said property and interests in property shall be conveyed, and will then present a deed or deeds containing full warrants of title, free from incumbrances and other matters, to convey a complete title, which the said parties of the first and second parts agree shall be duly

executed, in accordance with this agreement *~~a copy of a draft of which deed is thereto attached, and the original~~ upon the execution thereof will pay over or cause to be paid over all moneys which may be due hereunder to the persons entitled to receive the same.

IT IS AGREED that the term of this agreement shall be ONE YEAR from date hereof, and that if said parties of the first and second part cannot then be prepared to make conveyances hereinbefore agreed to be made, they shall, upon the request of the said Buyer, refund to the Buyer all moneys advanced upon the consideration of this agreement, together with legal interest, as well as refund all amounts due by either of said parties to or on account of said Buyer, with interest.

(BUT THIS AGREEMENT shall not be enforceable
OUT (against the said Buyer unless he shall be fully satis-
(fied with the title offered to be conveyed to him by
(said parties of the first and second part.

IN WITNESS WHEREOF, the said parties of the first, ~~and second part~~ second and third part have hereunto set their hands, the day and year first aforesaid.

.....

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.....

(NOTES In paragraph "2nd" of the instrument the words "when so secured" are underscored in pencil, "at

*Interlineation written in pencil and then lined out.

the expense of the Buyer" in red ink over pencil, and "until every title shall be secured as aforesaid" in pencil; and the numbers "2" and "1" in the margin are in red ink over pencil. Against the next to last paragraph appears a bracket with "OUT" written in longhand, both in blue pencil.)

DEFENDANTS' EXHIBIT "B".

THIS AGREEMENT, made and entered into this 19th day of December, A. D. 1901, by and between Charles H. Holbrook of the City and County of San Francisco, State of California, the party of the first part and T. D. Collins and J. G. Curtis of the Counties of Forest and McKean, State of Pennsylvania, the parties of the second part.

WITNESSETH: That for and in consideration of the sum of One ($1.00) Dollar from each of the parties hereto to the other paid, the receipt of which is by each of said parties hereby acknowledged, and of the stipulations and promises hereinafter contained, the parties hereto do promise and agree as follows:

Said party of the first part promises and agrees to sell to and have the title thereto vested in, the said parties of the second part, their heirs or assigns and as in the manner hereinafter set forth Forty-two thousand three hundred and eighty (42380) acres of timber lands situated and being in the Counties of Tehama and Plumas, State of California, for the sum and cost to the said parties of the second part of Seven and 50/100 ($7.50) Dollars, per acre, making the aggregate or total cost of the whole of said land to the said parties of the second part, less Two thousand two hundred and fifty ($2250.00) Dollars, interest, the sum of Three hundred and fifteen thousand six hundred ($315,600.00) Dollars, which sum and price the said parties of the second part hereby agree to pay for said lands as and in the manner and at the times in this agreement provided.

Said party of the first part agrees to and shall purchase and properly secure from parties owning the same, Forest

Reserve to the amount of Forty-two thousand three hundred and eighty (42380) acres and in exchange for the said Forest Reserve obtain the said Forty-two thousand three hundred and eighty (42380) acres of timber lands in said Counties of Tehama and Plumas, as per schedule attached, the title to the same to be secured to said parties of the second part, their heirs or assigns in the manner hereinafter set forth.

It is agreed between the parties hereto that the whole of said Forest Reserve shall be properly conveyed and "Trustee" deeded to G. Howard Thompson of San Francisco, hereinafter referred to as "Trustee", to be held by him in trust for the purposes and upon the terms in this agreement expressed.

Said parties of the second part promise and agree to deposit in and with the Bank of California, of San Francisco, on or before the 31st day of December, 1901, the sum of Two hundred thousand ($200,000.00) Dollars in lawful money of the United States, said sum to be used and applied by said bank in the payment at the rate of not to exceed Five ($5.00) Dollars per acre for all Forest Reserve not exceeding Forty-two thousand three hundred and eighty (42380) acres, which may be deeded or otherwise properly transferred to and in the name of said trustee by parties owning the same, and having good title thereto, (said title to be certified as hereinafter set forth) and who shall accompany their deeds or other instruments of transfer with a written statement to said Bank of California, signed by said party of the first part, that the person or persons deeding the same to said trustee, are

entitled to be paid out of said deposit for the lands described in their deed or deeds and with the written certificate of Charles A. Shurtleff, an attorney of San Francisco, that the title to the property described in the deed or deeds, is in the person or persons deeding the same, and that the lands described therein are wholly within the exterior boundaries of a Forest Reserve, and are Forest Reserve lands.

Said parties of the second part agree that when the said Two hundred thousand ($200,000.00) Dollars is exhausted, upon demand, to deposit in said bank the balance necessary to secure said Forty-two thousand three hundred and eighty (42380) acres of land at the rate of not to exceed Five ($5.00) Dollars per acre, and to be deeded to said trustee as aforesaid, said balance to be held and expended as and upon the same conditions, as said Two hundred thousand ($200,000.00) Dollars is held and expended hereunder.

It is agreed by all the parties hereto that neither the said trustee nor the said Bank of California shall be, or are, required to make any examination or inquiry whatsoever, as to the title to any lands deeded to said trustee hereunder, and to be paid for out of said deposit as aforesaid, but shall accept the said certificate of title of the said Charles A. Shurtleff as final, and that any payments made hereunder by the said bank upon any certificate of the said Charles A. Shurtleff, shall be conclusive, as to title, upon each and all of the parties hereto.

That the said trustee shall, at the written request of the said party of the first part, properly deed to the United States of America, the lands deeded to him as

aforesaid, and make application in proper and legal form for specific tracts of land mentioned in the attached schedule in lieu of the lands so deeded. All of said specific tracts of land to be placed and located, and descriptions thereof furnished to the said trustee by the said party of the first part.

That the said trustee, provided he shall have received the notice from the said party of the first part that he has been fully paid, which notice is hereinafter provided for, shall, at the request of the said parties of the second part, either before or after receipt of United States Patents therefor, deed said lieu lands by proper deeds of conveyance, to the said parties of the second part, their heirs or assigns, or to any persons or corporation they may, in writing, jointly direct.

That all papers in connection with applications for specific tracts of land in lieu of Forest Reserve, shall be prepared by said Charles A. Shurtleff, and that any application made by the said trustee upon papers so prepared by the said Charles A. Shurtleff, shall be conclusive upon each and all of the parties hereto, and that said trustee shall not in any manner or at all, be held responsible therefor, or for any errors therein; the intention of this agreement being that in all cases where the said trustee makes application for said lien lands upon papers prepared by the said Charles A. Shurtleff, the said trustee not only does not assume any responsibility, but is expressly relieved from all responsibility in the premises.

The said parties of the second part agree when the said party of the first part shall have obtained Forty-two thousand three hundred and eighty (42380) acres of Forest

Reserve, and have had the same deeded to the said trustee, as herein provided, or shall have secured the title to Forty-two thousand three hundred and eighty (42380) acres of timber lands in Plumas and Tehama counties by having Forest Reserve deeded to said trustee, or otherwise procured the title thereto, or sooner if the parties to this agreement consent thereto, to form and organize a Corporation under the laws of the State of California, having for its purposes, among other things, the purchasing and acquiring of said and other timber lands and cutting the timber thereon, and manufacturing it into lumber or other articles of commercial value, and selling the same.

That the said corporation shall have a capital stock of Five hundred thousand ($500,000.00) Dollars, divided into 5000 shares, having a par value of One hundred ($100.00) Dollars each.

That the said parties of the second part shall, upon the completion of the organization of said corporation, deed and convey, or cause to be deeded or conveyed, to said corporation, all of the said Forty-two thousand three hundred and eighty (42380) acres of land in Tehama and Plumas Counties, and receive in full payment therefor three thousand one hundred and fifty-six (3156) shares of the capital stock of the said corporation fully paid up, issued to them and in their names, and the balance of said stock being One thousand eight hundred and forty-four (1844) shares shall remain in the treasury of the corporation and shall not be sold for less than par.

That the said party of the first part shall be one of the original incorporators of said corporation, and shall serve as, and be, a director so long as he owns any stock therein.

That the By-laws and purposes of said corporation shall be mutually agreed upon by and between the parties hereto.

That when said Forty-two thousand three hundred and eighty (42380) acres of Forest Reserve shall have been deeded to the said trustee as hereinbefore provided, or the title to said Forty-two thousand three hundred and eighty (42380) acres secured to said parties of the second part by acquiring Forest Reserve or through any other method or source, the said parties of the second part shall pay to the said party of the first part the balance of the said purchase price of said lands, to wit: the sum of One hundred and fifteen thousand six hundred ($115,600.00) Dollars, such payment to be made in the manner following, to wit: They shall deliver to the said party of the first part properly endorsed and fully paid up and free from assessments, and all other liens whatsoever, 789 shares of the capital stock of the said corporation to be organized as aforesaid; from Five thousand ($5000.00) Dollars to Ten thousand ($10,000.00) in cash, and the balance in notes of the said parties of the second part, payable six months from date, with interest thereon at the rate of six (6%) per cent per annum until paid, in full payment of said balance, and said party of the first part shall give said second parties a notice to said trustee that said balance has been paid with an order to convey said lands and titles to said second parties.

It is expressly understood and agreed that the said trustee shall not deed or convey to the said parties of the second part or either of them, or their or either of their heirs, executors, administrators or assigns, any part or

portion of the said Forest Reserve, or lands which he, said trustee, may acquire and hold in lieu of said Forest Reserve, or under this agreement until the said party of the first part shall, in writing, notify said trustee that he has been fully paid the sum of One hundred and fifteen thousand six hundred ($115,600.00) Dollars.

It is further agreed that if said parties of the second part shall advance, to be applied toward the purchase of said lands, any amount in excess of said Two hundred thousand ($200,000.00) Dollars, then and in that event the principal sum or sums of said promissory notes which said parties of the second part are to execute and deliver to said party of the first part, as aforesaid, shall be reduced in an amount equal to such excess.

It is agreed that if for any reason said party of the first part is unable to secure the title to the whole of the said Forty-two thousand three hundred and eighty (42380) acres of timber lands in Plumas and Tehama Counties, through and by the use and application of Forest Reserve, he may secure such title through any other legal means or source; it being understood, however, that in no event shall he or the persons deeding the same be paid for the lands thus acquired, until the title thereto is certified to be good by the said Charles A. Shurtleff, and deeded to said trustee, and that when so certified, the said bank shall pay from said deposit for said lands, it being understood and agreed that all the provisions and stipulations of this agreement as to payment by said Bank of California for, and covering, the purchase of Forest Reserve, shall also apply to the payment for, and purchase of, lands the title to which is secured other than by the application or use of Forest Reserve.

It is agreed by and between the parties hereto that should it be found practicable, a Corporation shall be organized for the purpose of acquiring, building, owning and conducting a railroad to and from the lands acquired under this agreement, and the said party of the first part shall have and has the right and option to subscribe for and purchase the same proportion of the capital stock of said railroad corporation as, at the time of its organization, the stock he owns or is entitled to receive, in the said corporation to be organized for the purpose of buying and selling timber lands, manufacturing lumber, etc., bears to the subscribed capital stock thereof, and that said party of the first part shall be a director in said corporation so long as he owns any stock therein.

Should the purchase of all of said Forty-two thousand three hundred and eighty (42380) acres of Forest Reserve from the owners, not exhaust all of said Two Hundred thousand ($200,000.00) Dollars so deposited in the Bank of California by second parties for that purpose as aforesaid, then when the owners are paid for all of said Forty-two thousand three hundred and eighty (42380) acres of Forest Reserve lands out of said fund, the balance of such fund shall belong to said party of the first part.

This writing is executed in triplicate and shall bind the heirs, executors, administrators and assigns of the parties hereto.

IN WITNESS WHEREOF, the said parties hereto have hereunto set their hands and seals the day and year first herein written.

CHARLES H. HOLBROOK. (Seal)
T. D. COLLINS. (Seal)
J. G. CURTIS. (Seal)

Word "Trustee" above last line on first page of this contract interlined before signing.

Witness:

D. G. CURTIS.

State of Pennsylvania,
County of Warren.—ss.

Be it remembered that on this 19th day of December, A. D. 1901, before me, the subscriber, a Justice of the Peace in and for said County, personally appeared Charles. H. Holbrook, the grantor, mentioned in the foregoing contract and agreement, and acknowledged that he executed and delivered the foregoing indenture of contract and agreement and desired the same recorded.

Witness my hand and official seal.

[Seal] H. S. PERRY, J. P.

State of Pennsylvania,
County of Warren.—ss.

Be it remembered that on this 19th day of December, A. D. 1901, before me, the subscriber, a Justice of the Peace in and for said County, personally appeared T. D. Collins, one of the covenantors, mentioned in the foregoing contract and agreement, and acknowledged that he executed and delivered the foregoing indenture of contract and agreement and desired the same recorded.

Witness my hand and official seal.

[Seal] H. S. PERRY, J. P.

DEFENDANTS' EXHIBIT "D".

"THIS AGREEMENT, made and entered into this 31st day of December A. D. 1901, by and between Charles H. Holbrook of the City and County of San Francisco, State of California, the party of the first part, and T. D. Collins and J. G. Curtis of the Counties of Forest and McKean of Pennsylvania, the parties of the second part,

"WITNESSETH: That Whereas, the said parties did heretofore, to wit: on the 19th day of December, 1901, enter into a contract for the sale by the said party of the first part to the said parties of the second part of forty-two thousand three hundred and eight (42380) acres of timber lands, situated and being in the Counties of Tehama and Plumas, State of California, and,

"WHEREAS, the said parties desire to modify said contract in the following particulars,

"NOW THEREFORE, it is mutually agreed by the parties hereto that said above mentioned contract shall be and is hereby modified and changed in the following particulars, to wit: The word 'Trustee' appearing immediately after the words 'G. Howard Thompson', in the fifth paragraph, page one of the above mentioned contract is hereby stricken out and said fifth paragraph of said agreement is hereby amended so as to read as follows, to wit:

"'It is agreed between the parties hereto that the whole of said Forest Reserve shall be properly conveyed and deeded to G. Howard Thompson, of San Francisco, hereinafter referred to as "Trustee", to be held by him in trust for the purposes and upon the terms in this agreement expressed.'

"It is further agreed that this agreement shall be annexed and attached to said agreement of December 19th, 1901.

"In Witness Whereof, the parties hereto have hereunto set their hands and seals this 31st day of December, A. D. 1901.

"_____ (Seal)

"_____ (Seal)

"_____ (Seal)

"State of California,

"City and County of San Francisco,—ss.

"On this 31st day of December in the year one thousand nine hundred and one, before me_____, a Notary Public in and for said City and County, residing therein, duly commissioned and sworn, personally appeared Charles H. Holbrook, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.